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SHOW PROCEEDINGS AND ORDERS DATE: [05/15/88]

CASE NBR: [87101702] [CFX] CASE STATUS: [ ]
SHORT TITLE: [Chattem, Inc.]
VERSUS [Bailey, Wesley] DATE DOCKETED: [041488]

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DATE	NOTE	PROCEEDINGS & ORDERS
Apr 14 1988		Petition for writ of certiorari filed.
May 13 1988		Brief of respondent Wesley Bailey in opposition filed.
May 17 1988		DISTRIBUTED. June 2, 1988
May 25 1988		Reply brief of petitioner Chattem, Inc. filed.
Jun 3 1988		REDISTRIBUTED. June 9, 1988
Jun 13 1988		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

87 1702

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHATTEM, INC., A CORPORATION,

Petitioner,

v.

WESLEY T. BAILEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHATTEM, INC.
Petitioner

DAVID R. EVANS
Counsel of Record
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402
Telephone: (615) 756-3000

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. When a civil action is remanded for a new trial on the issue of damages without the instructions required by Rule 37 of the Federal Rules of Civil Procedure if interest is to attach from a date other than the judgment on remand, may the Court of Appeals subsequently excise the statutory requirements of 28 U.S.C. §1961 under an "equitable construction" theory and order an award of interest for the period preceding the entry of the money judgment on which interest is being calculated?

2. If 28. U.S.C. §1961 does permit the recovery of such prejudgment interest, is it proper to award prejudgment interest on the present value calculation of a future stream of income required under state law when the defendant no longer has an opportunity to insist that the present value calculation be made as of the same date that interest is subsequently determined to begin accruing under a federal statute?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

Defendant-Appellant is Chattem, Inc.

Plaintiff-Appellee is Wesley T. Bailey

Pursuant to Sup. Ct. Rule 28.1, Petitioner certifies that it is an independent corporation with no subsidiaries which are not wholly owned.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	(i)
PARTIES TO THE PROCEEDINGS BELOW	(ii)
TABLE OF AUTHORITIES	(iv)
REPORT OF OPINIONS	1
JURISDICTION	2
STATUTORY PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
1. The Award of Post-Judgment Interest Following a Remand Presents an Important Question Involving a Fundamental Aspect of the Day to Day Administration of Justice Within the Federal Court System Which Requires the Exercise of This Court's Power of Supervision.	8
2. The Decision of the United States Court of Appeals for the Sixth Circuit is in Conflict With Long Standing Precedent of This Court Explicitly Codified By Rule 37 of the Federal Rules of Appellate Procedure.	12
3. The Decision of the Court of Appeals for the Sixth Circuit is in Conflict With the Decisions of Other Courts of Appeals.	16
4. The Statutory Requirements of 28 U.S.C. §1961 May Not Be Excised in Order to Create a Federal Right to Pre-Judgment Interest.	19

5. State Law Provisions Requiring a Future Stream of Income to Be Reduced its Present Value Should Not be Subverted by Imposing a Federal Rule of Decision Which Permits Interest To Be Awarded on the Present Value Calculation From a Date Earlier Than the Date on Which the Present Value is Actually Calculated. 20

CONCLUSION 23

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: Page

Affiliated Capital Corp. v. City of Houston, et al. 793 F.2d 706 (5th Cir. 1986) 11,17

Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979) 11

Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir. 1988) ..... *passim*

Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948) ..... *passim*

Buck v. Burton, 768 F.2d 285 (8th Cir. 1985) 12,17

Chattem, Inc. v. Bailey, 684 F.2d 386 (6th Cir. 1982) 15

Chesapeake & Ohio Railway Co. v. Kelly, 241 U.S. 485, 489 (1916) 22

Copper Liquor, Inc. v. Adoph Coors Co., 701 F.2d 542 (5th Cir. 1983) 18

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927) 14

Handguards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984), *cert. denied* 469 U.S. 1190 (1985) 12,17

Harris v. Chicago Great Western Railway Co., 197 F.2d 829 (7th Cir. 1952) 11,17

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) 14

Himley v. Rose, 5 Cranch (U.S.) 313, 3 L.Ed. 365 13

Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977) 11,17

Louisiana & Arkansas Railway Co. v. Pratt, 142 F.2d 847 (5th Cir. 1944) 10

National Bank of Commonwealth v. National Bank, 94 U.S. (4 Otto) 437 (1876) 16

Powers v. New York Central Railroad Co., 251 F.2d 813 (2nd Cir. 1958) 11,17

Table of Authorities Continued

	Page
Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976)	11
Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987)	12,17
Turner v. Japan Lines, Ltd., 702 F.2d 752, (9th Cir. 1983)	12,17
United States v. Hougham, 301 F.2d 133 (9th Cir. 1962)	12
United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971)	18
STATUTES AND RULES:	
28 U.S.C. §1254	2
28 U.S.C. §1961	*passim*
28 U.S.C. §636	6
Rule 37, F.R.A.P.	*passim*
Rule 41, F.R.A.P.	7
Rule 59, F.R.C.P.	15
Rule 67, F.R.C.P.	5
MISCELLANEOUS:	
Senate Report No. 97-255, reprinted in U.S.C. Cong. & Adm. News (1982), p. 11	20
Senate Judiciary Committee Hearing Report dated May 18, 1981 on the Federal Courts Improvement Act of 1981, Senate Bill No. 21	20

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Supreme Court of the United States

OCTOBER TERM, 1987

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CHATTEM, INC., A CORPORATION,

Petitioner,

vs.

WESLEY T. BAILEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Chattem, Inc., prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered January 26, 1988 following the subsequent denial by such court on March 15, 1988 of Petitioner's timely motion for rehearing or, in the alternative for rehearing en banc.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. Opinion and Order of the United States Court of Appeals for the Sixth Circuit rendered January 26, 1988 [reported at 838 F.2d 149 (6th Cir. 1988)].

2. Order of the United States Court of Appeals for the Sixth Circuit rendered March 15, 1988 (not reported).

3. Opinion and order of the United States Magistrate for the Eastern District of Tennessee, Southern Division rendered on October 10, 1986 [not reported].

4. Judgment and mandate of the United States Court of Appeals for the Sixth Circuit rendered August 3, 1982. [Opinion reported at 684 F.2d 386 (6th Cir. 1982)].

5. Judgment of the United States Magistrate for the Eastern District of Tennessee, Southern Division, rendered August 5, 1983 [not reported].

6. Opinion and Order of the United States Court of Appeals for the Sixth Circuit rendered October 16, 1985 [not reported].

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 26, 1988. Petitioner's timely motion for rehearing or, in the alternative, for rehearing en banc was denied by the Court of Appeals on March 15, 1988. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. §1961, provides in pertinent part as follows:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied

> by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

Rule 37, F.R.A.P., provides as follows:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Rule 59, F.R.C.P., provides in pertinent part as follows:

> (e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

Respondent filed a multiple count common-law diversity action against the Petitioner on February 27, 1979, in the United States District Court for the Eastern District of Tennessee, Southern Division. The action arose out of a consulting agreement between the Respondent and the Petitioner in connection with the development of certain intellectual property in the chemical field. The case was tried before a jury with a United States Magistrate presiding. Judgment was ultimately entered on the jury's verdict by the Magistrate in favor of the Respondent in the aggregate amount of $502,000 on October 27, 1980.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit. On appeal, the judgment was affirmed as to liability, and as to a portion of the damages. The case was remanded with instructions for a new trial on the compensatory damages which had been awarded on the Respondent's claim for promissory fraud which represented the bulk of the damages previously awarded. The mandate from the Sixth Circuit on the appeal contained no instructions with respect to the award of interest, and at no time did the Respondent ever seek to recall that mandate in order to permit the award of interest from

a date other than the date that judgment was ultimately entered on remand.

While the case was awaiting retrial, a partial final judgment was entered against the Petitioner on those counts which had been affirmed on appeal. Petitioner satisfied that judgment, including all interest due thereon, and no issue currently exists with respect to the entry or satisfaction of that judgment. On the retrial following the remand, however, the jury awarded the Respondent $627,000 which was in excess of the $400,000 award previously vacated on appeal. The Magistrate promptly ordered judgment on the verdict and a form judgment was entered on August 5, 1983 providing for interest thereon at the rate provided by law. The judgment primarily represented a future stream of income extending over an eleven year period reduced to its present value as of the August, 1983 trial date. Also included within the August 5, 1983 judgment was a comparatively small amount for damages which were claimed for consulting fees accruing prior to the August 1983 trial date.

Chattem again appealed to the United States Court of Appeals for the Sixth Circuit where the court, after noting that the case had previously been before it, affirmed the judgment in a per curiam opinion which issued as a mandate on November 7, 1985. Respondent's trial counsel, who had also been sued for fraud by the Respondent during the pendency of the second appeal, immediately filed attorneys' liens and sought to intervene in the litigation on November 13, 1985. Two days later Petitioner filed a motion pursuant to Rule 67 of the Federal Rules of Civil

Procedure requesting that it be permitted to pay the judgment into court.

With the case in this posture, Respondent's counsel indicated during the course of a December 1985 conference with the Magistrate to discuss the attorneys' liens that a claim for prejudgment interest might be forthcoming based on an unspecified California case. The Magistrate set down a briefing schedule and on February 7, 1986 Respondent filed a "Motion to Amend Final Order" in an effort to obtain prejudgment interest. No Federal Rule of Civil Procedure was cited in support of the motion.

The Respondent's motion for prejudgment interest was denied by the Magistrate pursuant to an opinion and order entered October 10, 1986.[1] Respondent then filed what was to become the third appeal to the United States Court of Appeals to the Sixth Circuit.

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[1] Respondent's plan to seek prejudgment interest precipitated a dispute over the question of whether the applicable interest rate on the money judgment entered on August 5, 1983 should be set at 10.25% as determined under 28 U.S.C. §1961 for money judgments rendered on that date or at the applicable state rate of 10% because the Magistrate's Court in which the judgment had been rendered was not a district court within the meaning of the statute. Petitioner conceded the point soon after the filing of the Respondent's motion as a result of the denial by this Court of an earlier petition for certiorari pursuant to which the Petitioner had challenged the constitutionality of the Federal Magistrates Act, 28 U.S.C. §636, *et seq.*, as an impermissible transfer of subject matter jurisdiction over Article III diversity actions to Article I courts. The amount of the judgment, including all interest accruing thereon after August 5, 1983 at the rate of 10.25% was paid into the registry of the Court well before the denial of the Respondent's motion for prejudgment interest and the rate of interest is not in issue herein.

On appeal, the Sixth Circuit held that *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948) and presumably Rule 37, F.R.A.P. were not binding upon it, adopted an "equitable construction" of 28 U.S.C. §1961, and reversed the decision of the Magistrate without ever finding it to be in error.

The case was remanded by the Sixth Circuit with instructions to enter an award of interest on the previously vacated judgment in accordance with the opinion. The opinion, however, is unclear as to what elements of damage are to be accorded prejudgment interest and how the "applicable" Treasury Bill rates are to be determined on and after the effective date of the 1982 amendments to 28 U.S.C. §1961 on October 1, 1982.

Petitioner filed a timely motion for rehearing or, in the alternative, for rehearing en banc which was denied on March 15, 1988. A motion for a stay of the court's mandate under Rule 41, F.R.A.P. to permit the filing of this petition is currently pending before the Sixth Circuit. Although a substantial portion of the decision of the court of appeals below is devoted to the issue of whether state or federal law controls the award of post-judgment interest on United States District Court judgments, there was no dispute between the parties who both agreed that federal law controlled.

Petitioner respectfully suggests that the Sixth Circuit erred in at least three respects. First, Petitioner respectfully submits that *Briggs v. Pennsylvania R. Co.*, supra and Rule 37, F.R.A.P. are binding upon the Sixth Circuit and that the failure to comply therewith bars the Respondent's claim. Second, to the extent the Respondent's claim is not barred by the

failure to comply with Rule 37, the provisions of 28 U.S.C. §1961 do not admit to the equitable construction adopted by the Sixth Circuit so as to permit the award of interest from the date of a judgment which establishes only liability. And finally, if 28 U.S.C. §1961 does admit to such an equitable construction, Petitioner respectfully suggests that the prejudgment interest should not be retrospectively awarded as a matter of Federal law on a present value calculation of future damages required under state law.

REASONS FOR GRANTING THE WRIT

1. The Award of Post-Judgment Interest Following a Remand Presents an Important Question Concerning a Fundamental Aspect of the Day to Day Administration of Justice Within the Federal Court System Which Requires the Exercise of This Court's Power of Supervision.

The award of interest on money judgments recovered in civil actions tried in the district courts following a remand is an issue which confronts litigants, practitioners and the district courts across this country almost daily. It is matter over which Petitioner respectfully suggests that litigants and practitioners ought to be able to expect clear rules and even-handed treatment. But it is a matter which has become anything but routine or even-handed in the forty years since this Court last handed down several bright line rules governing the award of interest in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948). Whether interest is to be awarded following a remand is governed by both Rule 37, F.R.A.P. and the provisions of 28 U.S.C. §1961.

The provisions of Rule 37, F.R.A.P., which essentially codified the *Briggs* rule are long-standing and direct:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to the allowance of interest.

The notes of the advisory committee to Rule 37 clearly indicate that the rule is intended as a warning to both counsel and to the courts of the *Briggs* rule which holds that where a judgment is modified or reversed on appeal the lower court is powerless to award interest from a date other than from the judgment on remand unless the mandate provides otherwise. See Notes of Official Advisory Committee to Rule 37, F.R.A.P. Failure to comply with Rule 37 thus serves as a bar to claiming interest from a date other than the date of the judgment on remand. But as indicated by the rule whatever interest may be authorized by the mandate for the period prior to the judgment on remand must still be founded on a statutory basis.

The provisions of 28 U.S.C. §1961 which govern the award of post-judgment interest in this case are also relatively simple and straightforward.

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calcu-

> lated from the date of entry of the judgment, at a rate equal to the coupon yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty two week United States Treasury Bills settled immediately prior to the date of the judgment."

A great deal of confusion and controversy has erupted between the circuits, however, as to when interest may be allowed under the statute on a judgment modified or reversed on appeal. *See* part 3, *infra*. Much of that confusion and controversy may be attributed to a statutory forerunner to 28 U.S.C. §1961 which was construed more than forty years ago by the Fifth Circuit in *Louisiana & A.R. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944). Unlike the current statutory provision, however, the provisions of former 28 U.S.C. §811 which were before the Court in *Pratt* did not specifically require the entry of a *money* judgment as a condition to obtaining an award of interest.

Against this background, Petitioner respectfully suggests that it is unfortunate that so much confusion, uncertainty and additional litigation has been spawned. Yet this is precisely what has happened. Contrast, for example, the requirements of *Briggs* and Rule 37, F.R.A.P. with the express language of the Sixth Circuit's ruling in the present case:

> "Bailey correctly notes that the August 3, 1982 mandate of this Court was appropriately silent on the subject of interest. That mandate did not order entry of a judgment for money damages but ordered a new trial. The issue of interest was not raised by the

> parties, and *it is unreasonable to expect this Court to deal with the interest issue in an opinion ordering a new trial." Bailey v. Chattem*, 838 F.2d 149, 151 (6th Cir. 1988) (emphasis supplied).

Petitioner respectfully submits that the Sixth Circuit's decision simply cannot be reconciled with either *Briggs* or Rule 37. Whether the judgment was reversed and remanded for a new trial or modified with instructions to enter a new money judgment makes no difference. Rule 37 and *Briggs* apply to either situation and it would be disingenuous to suggest otherwise. This seems particularly true where the court subsequently attempted to justify the "equitable construction" of 28 U.S.C. §1961 at least in part on the basis "that 'some damages' would be due upon retrial." 838 F.2d at 154.

As to when interest may be authorized under the statutory provisions of 28 U.S.C. §1961, there are splits not only among the circuits but within the individual circuits as well. Compare, for example, the decisions of the Second, Seventh, Eighth and Tenth Circuits which limit the award to interest from after the date of the judgment on remand in *Powers v. New York Central Railroad Co.*, 197 F.2d 813, 818 (2nd Cir. 1958), *Harris v. Chicago Great Western Railway Co.*, 197 F.2d 829, 836 (7th Cir. 1952), *Hysell v. Iowa Public Service Co.*, 559 U.S. 468, 476-77 (8th Cir. 1977), *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053, 1054-55 (8th Cir. 1976), and *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979), with the case at bar, the Fifth Circuit's decision in *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986) and

other cases cited therein, the Ninth Circuit's decisions in *Handguards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), cert. denied 469 U.S. 1190 (1985), *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 753 (9th Cir. 1983), and *United States v. Hougham*, 30 F.2d 133 (9th Cir. 1962) as well as the more recent Eighth Circuit decisions in *Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985), and *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1977).

These cases indicate that results can and do vary widely on an issue which Petitioner respectfully suggests ought to be a uniform principle applicable in all Federal Courts. Petitioner, therefore, respectfully requests that the Court grant its petition for a writ certiorari in order to clarify a matter of fundamental importance to the administration of justice within the federal court system.

2. The Decision of the United States Court of Appeals for the Sixth Circuit is in Conflict With Long Standing Precedent of This Court Explicitly Codified By Rule 37 of the Federal Rules of Appellate Procedure.

In the case at bar, the Sixth Circuit expressly declined to follow this Court's decision in *Briggs v. Pennsylvania R. Co.*, supra, contending that Briggs and presumably Rule 37, F.R.A.P. do not serve as a limitation on "*our* power to modify the application of interest to a judgment." 838 F.2d at 151 (emphasis original). Petitioner respectfully suggests the *Briggs* is indeed binding on the court of appeals as evidenced by its codification as part of the Federal Rules of Appellate Procedure under Rule 37.

Briggs involved an action in which a judgment notwithstanding the verdict had been entered by the trial

court in defendant's favor only to be subsequently reversed by the appellate court. Although the appellate court's mandate was silent as to the award of interest, on remand the district court ordered the award of interest from the date of the original verdict. No motion had been made to recall the mandate of the appellate court and on a second appeal the United States Court of Appeals for the Second Circuit reversed so much of the award of interest as accrued prior to the date of the judgment on remand. This Court affirmed the Second Circuit's decision noting that since its earliest days this Court has consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court and that Chief Justice Marshall has previously applied the rule to interdict interest not provided in the mandate, citing *Himley v. Rose*, 5 Cranch (U.S.) 431, 3 L.ed. 111. See *Briggs v. Pennsylvania R. Co.*, *supra* at 306. The Court in *Briggs* then concluded:

> "The [second circuit's] mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by the amendment of the mandate. But no move to do this was made during the term at which it went down." *Id.*

The case at bar came before the Sixth Circuit in precisely the same posture as *Briggs*. A money judgment had been reversed by the Sixth Circuit and a new trial had been ordered. No instructions were contained within the mandate with regard to the award of interest and no motion to recall the mandate was ever made. The only difference between *Briggs* and

the case now at bar is that in the present case the lower court refused to grant interest from the date of the judgment establishing liability because it correctly noted that until the money judgment was entered on August 5, 1985, there was no money judgment which could be recovered in a district court as required by 28 U.S.C. §1961.

In suggesting that *Briggs* and the requirements of Rule 37, F.R.A.P. were not binding upon it, the Sixth Circuit appears to be claiming that it is free to recall its own mandate at any time with or without application therefor in order to retrospectively grant an award interest which has not been previously authorized. But if this is what the court of appeals has decided, it cannot be reconciled with the balance of this Court's earlier decision in *Briggs*:

> "While power to act on its own mandate after the term expires survives to protect the integrity of the court's own processes, *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S. Ct. 997, it has not been held to survive for the convenience of the litigants. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 72 L.Ed. 168, 48 S. Ct. 97." *Briggs v. Pennsylvania R. Co.*, supra at 306.

There was no finding by the Sixth Circuit in this case of excusable neglect on the part of the Respondent in failing to seek a timely recall of the August 3, 1982 mandate. Nor could there be such a finding absent exigent circumstances unrelated to the actual requirements of the rule given its long standing nature. The question of interest which should have

been raised in connection with the mandate on the first appeal was not in fact raised until December of 1985, well after both the second trial and second appeal. Even then the Respondent failed to move for a recall of the Sixth Circuit's August 3, 1982 mandate and in fact that issue was never raised or briefed by the parties before the appellate court.

Nor can it be fairly said that the Sixth Circuit was entitled to recall its mandate *sua sponte* in order to protect the integrity of its own process. The parties had already gone through a second trial and appeal in which a future stream of income extending over an eleven year period from the date of the trial had been reduced to its present value as of the trial date as required by state law. See *Chattem, Inc. v. Bailey*, 684 F.2d 386, 395 (6th Cir. 1982). To the extent that the Sixth Circuit may have awarded prejudgment interest on the present value calculation, it only distorts Petitioner's right under state law to insist that the present value calculation be made as of the same date that post-judgment interest begins accruing thereon.

The Magistrate's decision was never found to be in error by the Sixth Circuit and it is apparent that the Magistrate could not have granted relief ordered by the Sixth Circuit in conformity with this Court's ruling in *Briggs* and the applicable Federal Rules of Civil and Appellate Procedure. Rule 59(e), F.R.C.P. requires any motion to amend or alter the judgment to be filed within ten (10) days of the entry of the judgment and that clearly was not done in the case at bar even if the trial court could have somehow included such prejudgment interest as part of the August 5, 1983 judgment.

This Court's decision in *National Bank v. Mechanics' National Bank*, 94 U.S. (4 Otto) 437, 24 L.Ed. 176 (1876) has been cited by both the Fifth Circuit in *Pratt* and by the Sixth Circuit in the case at bar as support for the "equitable construction" theory. But *National Bank* involved a claim for accrued interest on certain bank notes on which the underlying principal but not the accrued interest thereon had been paid. At issue was the question of whether interest could be awarded on interest either before or after judgment. The Federal statute in question declared only that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the states where they are rendered. Referring to the Revised Code of New York, the Court noted that interest was allowed upon judgments from the time they are perfected and that the claims in issue had been previously approved by the comptroller of the currency. Id. at 439. Petitioner respectfully submits that a fair reading of *National Bank* suggests that if it bears on the statutory issues raised herein at all, it is difficult to discern its impact.

3. The Decision of the Court of Appeals for the Sixth Circuit Is in Conflict With the Decisions of Other Courts of Appeals.

This Court did not reach the issue in *Briggs* with respect to when interest may be allowed on a judgment which is modified or reversed on appeal under the terms of the statutory predecessor to 28 U.S.C. §1961. See *Briggs v. Pennsylvania R. Co.*, *supra* at 307-308 (Rutledge, J. dissenting). In the forty years which have followed there has been a widespread divergence of opinion among the circuits on that issue

which Petitioner respectfully suggests may be generally classified under one of three schools of thought.

The Second, Seventh, Tenth, and at times the Eighth Circuit[2] preclude an award of interest prior to the date of judgment on remand where the judgment is modified or reversed on appeal. See *Powers v. New York Central Railroad Co.*, supra at 818; *Harris v. Chicago Great Western Railway Co.*, *supra* at 836; *Ashland Oil, Inc. v. Phillips Petroleum Co.*, *supra* at 336; and *Hysell v. Iowa Public Service Co.*, *supra* at 476-77. The First, Fifth, Sixth and Ninth Circuits have, on the other hand, authorized the award of interest prior to the date of the judgment on remand under an "equitable construction" theory. Within the "equitable construction" school, however, there is a further divergence of opinion.

The First and Fifth Circuits generally follow an ascertainment theory while the Sixth Circuit in the case at bar and Ninth Circuit[3] now permit interest to be awarded even though it is impossible to ascertain the amount of the judgment until after a new trial. Under the ascertainment theory followed by the First and Fifth Circuits interest will be awarded from the date of the original judgment only where the judgment is either reinstated on appeal or modified on appeal and upheld as to lesser amount. See, for ex-

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[2] But see *Buck v. Burton*, supra treating issue as a matter of first impression and *Total Petroleum, Inc. v. Davis*, supra which cites only *Buck* and grants interest prior to the date of judgment on remand.

[3] See *Handguards, Inc. v. Ethicon, Inc.*, *supra* at 1288-1299. But cf. *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983).

ample, *Copper Liquor, Inc. v. Adoph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) and *United States v. Michael Schiavone & Sons, Inc.*, 450 U.S. 875 (1st Cir. 1971). Ascertainment in these cases tends to focus on the question of whether or not the amount of the judgment could be generally viewed as liquidated apart from questions concerning liability or other minor adjustments.

None of the cases following the equitable construction theory have noted the change in the statutory language between the provisions of former 28 U.S.C. §811 which was before the court in *Pratt* and the current statutory language. Indeed, the Sixth Circuit rather bluntly elected to base its ruling on "the equities of a statute in a case like this" rather than the actual statutory language. 838 F.2d at 154.

If this case had been decided in the Second, Seventh, Tenth and at least before some panels of the Eighth Circuit, the Respondent's claim for prejudgment interest would have been clearly rejected and the Magistrate's decision affirmed. If decided in the First, Fifth and possibly some panels of the Ninth Circuit, the claim for prejudgment interest would have also been rejected on the basis that the amount of the judgment could not have been ascertained until after the new trial. Only in the Sixth Circuit and before at least some panels of the Ninth Circuit would it be possible to make a claim for prejudgment interest where a new trial was necessary to determine the amount of the judgment.

4. The Statutory Requirements of 28 U.S.C. §1961 May Not Be Excised in Order to Create a Federal Right to Pre-Judgment Interest.

Amended most recently in 1982, the provisions of 28 U.S.C. §1961 provide the only basis for awarding post-judgment interest on the case at bar. As previously noted, however, only *money* judgments which are *recovered* in a district court bear interest under the statute. The present statutory provisions thus materially depart from the former provisions of 28 U.S.C. §811 which indicated only that "[i]nterest shall be allowed on all judgments in civil causes, recovered in a district court."

In the case at bar, the Magistrate correctly noted that the statute requires a *money* judgment and that prior to entry of the judgment on August 5, 1983 there simply was no money judgment which could have been satisfied even if the petitioner had so desired. Yet the Sixth Circuit totally ignored the requirements of the very first sentence in its leap to "the equities of the statute in a case like this." At no point did the Sixth Circuit suggest where the money judgment recovered in a district court might be found prior to August 5, 1983, or how the vacated money judgment of October 27, 1980 could have been recovered in the district court.

Nor was any explanation offered by the Sixth Circuit as to why the first of the two subsequent references to the antecedent money judgment would mean August 5, 1983 for purposes of fixing the applicable rate of interest as the respondent had claimed, while the second reference to that same antecedent money judgment would mean October 27, 1980 for purposes of determining when the money judgment

was entered and interest began to accrue. If there is an answer to the interpretive conundrum, none has been advanced. Finally, Petitioner respectfully suggests that there is no reason to believe that the statute needs to be read in tortured fashion in order to bring forward some ill expressed congressional intent. The legislative history underlying the enactment of the 1982 amendments to 28 U.S.C. §1961 clearly indicate that efforts to include prejudgment interest provisions under the statute were opposed by the American Bar Association and ultimately rejected by Congress. See Senate Report No. 97-255, reprinted in U.S.C. Cong. & Adm. News (1982), p. 11 and the Senate Judiciary Committee Hearing Report dated May 18, 1981 on the Federal Courts Improvement Act of 1981, Senate Bill No. 21.

5. State Law Provisions Requiring a Future Stream of Income to Be Reduced its Present Value Should Not be Subverted by Imposing a Federal Rule of Decision Which Permits Interest To Be Awarded on the Present Value Calculation From a Date Earlier Than the Date on Which the Present Value Is Actually Calculated.

The judgment which Respondent obtained on August 5, 1983 was comprised of two elements of damage. One element was comprised of the consulting fees which the Respondent claimed were due him prior to the August, 1983 trial date after adjustment under an assumed cost of living formula. The second and substantially larger element of his damages related to an eleven year future stream of income which was also adjusted under the assumed cost of living formula and then discounted back to its present value as of the trial date.

The opinion of the Sixth Circuit in the case at bar is far from clear on the calculation of the interest to be awarded. But the opinion may suggest that prejudgment interest is to be awarded on both elements of damages if the total amount of the 1983 award is greater than the face amount of the 1980 award after the 1983 award is discounted to a 1980 present value. If this is fact the case, and the court does not indicate the significance of the calculation, the court's opinion may then suggest that interest is to be awarded on the entire amount of the vacated award through the date of the August 5, 1983 judgment. No indication is given in the court's opinion as to the handling of the credit arising out of such a present value calculation.

If the Sixth Circuit's ruling is ultimately interpreted in this manner, the ruling will give rise to some unexpected and surprising results from case to case. A plaintiff who recovers roughly the same amount in each of the two trials will presumably receive no additional interest because the discounted value of his second judgment will generally be less than the face amount of the original judgment. On the other hand, if a plaintiff is fortunate enough to win a much larger award the second time around than his unsuccessful counterpart, the successful plaintiff will be rewarded not only by getting to keep the much larger award, but prejudgment interest on the vacated award as well. In both cases the delay encountered by the parties is the same with the only difference being that the party who fails to obtain a dramatic increase in his or her award also fails to obtain an award of interest.

The rationale for requiring a present value calculation on future damages was set forth more than sixty years ago in *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 489 (1916).

> "So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Id.*

No explanation was offered by the Sixth Circuit as to why prejudgment interest should be added to a present value calculation if that is what the Court intended, and Petitioner respectfully suggests that none exists. To the extent that the Sixth Circuit's opinion purports to award such interest, it undercuts the very reason for conducting the present value calculation in the first place and effectively denies Petitioner the right to insist that the present value calculation be made as of the same date as interest is held to attach.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID R. EVANS, ESQ.
Counsel of Record
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402
615-756-3000

Dated: April 14, 1988.

APPENDIX

APPENDIX A

No. 86-6188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESLEY T. BAILEY,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL from the
	)	United States District
v.	)	Court for the Eastern
	)	District of Tennessee.
CHATTEM, INC.,	)	
	)	
Defendant-Appellee.	)	

Decided and Filed January 26, 1988

Before: MERRITT, KRUPANSKY and RYAN, Circuit Judges.

MERRITT, Circuit Judge, delivered the opinion of the court, in which RYAN, Circuit Judge, joined. KRUPANSKY, Circuit Judge, (pp. 14-16) delivered a separate opinion, concurring in part and dissenting in part.

MERRITT, Circuit Judge. This appeal concerning post-judgment interest under 28 U.S.C. § 1961 raises several esoteric issues. The principal question is whether interest should begin to run from the date of a district court judgment affirmed on appeal as to liability, but vacated and remanded for a new trial on damages, or only from the date of the second judgment. In the circumstances of this

case, in which the more specifically instructed second jury awarded damages greater than those awarded in the first judgment, considerations of equity lead us to conclude that interest should run on the amount common to both district court judgments from the date of entry of the first judgment.

I.

Petitioner-appellant Bailey sued Chattem, Inc., a Chattanooga manufacturer, in a diversity action for breach of contract and fraud arising from a controversy over the defendant's failure to commercialize and otherwise exploit a patented invention for improved paint developed by Bailey and assigned to Chattem. For further details, *see Bailey v. Chattem, Inc.*, 684 F.2d 386 (6th Cir. 1982). By stipulation of the parties, the case was tried before the Magistrate. The jury awarded $548,000 in compensatory damages and $75,000 in punitive damages for promissory fraud, and $27,000 in compensatory damages for failure to commercialize Bailey's invention. The Magistrate on March 6, 1980 entered judgment in the total amount of $650,000. On October 27, 1980 the Magistrate amended the fraud judgment to $400,000 after conditioning denial of defendant's motion for new trial on plaintiff's acceptance of a $148,000 remittitur in the promissory fraud damages; the $75,000 punitive damages and $27,000 for failure to commercialize were left intact.

On appeal, a panel of this Court affirmed on liability and affirmed the $27,000 and $75,000 categories of damages. But the Court reversed the $400,000 in compensatory damages for fraud because, although it was "clear that Bailey was entitled to at least *some* compensatory damages, . . . the trial court's instructions on damages were wholly inadequate to guide the jury in the complicated task of weighing [the] evidence to find the amount by which Bailey was defrauded." *Id.* at 394, 396-97 & n.12 (emphasis in original).

On retrial, the jury awarded Bailey compensatory damages of $627,000 on the fraud claim. This judgment was entered by the Magistrate on August 5, 1983, and affirmed on appeal by this Court. *Bailey v. Chattem*, Nos. 83-5424 and 84-5193, slip op. (6th Cir. Oct. 16, 1985), *cert. denied*, 106 S. Ct. 1376 (1986).

On February 7, 1986 Bailey moved to amend the District Court's judgment upon remand to provide that interest on the $627,000 award should run not from August 5, 1983, the date of the judgment upon retrial, but from October 27, 1980.[1] The Magistrate denied this motion, which forms the subject matter of this appeal.

II.

A preliminary question is whether Bailey has preserved the issue of post-judgment interest for appeal. Chattem argues that Bailey either should have moved this Court pursuant to Fed. R. App. P. 37 to amend its mandate in 1985 to provide for the interest he seeks, or should have made a post-trial motion in the District Court to amend its August 5, 1983 judgment upon retrial. Because Bailey did neither, Chattem argues that Bailey is foreclosed from relief, citing as authority *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948), and *Gele v. Wilson*, 616 F.2d 146 (5th Cir. 1980).

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[1] Bailey did not seek to have the interest calculated from the original judgment date of March 6, 1980, although the parties had agreed that interest on the two categories of damages affirmed by this Court in its 1982 decision should run from this date rather than the later October 27, 1980 date of the amended judgment of the District Court. Amendment to Judgment on Mandate, Dec. 9, 1982, App. 55.

Because Bailey does not seek to invoke the March 6, 1980 date as the date from which interest on the $627,000 should run, we shall treat October 27, 1980 as the original date of entry of judgment and thus not reach the question whether this date should be related back to March 6, 1980.

Briggs and *Gele* held that a district court has no authority on remand to calculate post-judgment interest from a date earlier than its post-remand entry of judgment unless the mandate of the court of appeals so directs. We do not agree, however, that either *Briggs* or *Gele* controls *our* power to modify the application of interest to a judgment. *See Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985) (distinguishing *Briggs* and *Gele*).

Bailey correctly notes that the August 3, 1982 mandate of this Court was appropriately silent on the subject of interest. That mandate did not order entry of a judgment for money damages but ordered a new trial. The issue of interest was not raised by the parties, and it is unreasonable to expect this court to deal with the interest issue in an opinion ordering a new trial.

The August 5, 1983 judgment of the District Court, which was affirmed by this Court in 1985, awarded Bailey $627,000 "with interest thereon at the rate provided by law." It is proper for the Magistrate to determine, upon affirmance, what interest was "provided by law," and it is proper for this Court to review that determination.

III.

There are three issues that must be disposed of to resolve the appropriate application of post-judgment interest in this case. First, in this diversity case, does state or federal law determine when post-judgment interest begins to accrue? Next, should 28 U.S.C. § 1961 be strictly construed to begin interest only from entry of a second judgment upon remand from a modification on appeal, or more liberally to provide interest from the date when a correct judgment should have been entered? Finally, how should the 1982 amendment of § 1961 affect the application of interest, when the original judgment was entered before that amendment and the judgment upon retrial was en-

tered subsequent to the amendment? We consider these issues in order.

A.

Since the 1948 revision and at the time the original judgment in this case was rendered, the relevant post-judgment interest statute relied on the applicable state interest rate:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

28 U.S.C. § 1961 (1976). Effective Oct. 1, 1982, the third sentence was amended to provide a uniform federal post-judgment interest rate, as follows:

> Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

28 U.S.C. § 1961(a)(1982).

On the question of which judgment should be used to trigger interest in this case, we conclude that this is a matter of federal, not state, law. Differing views on the choice of law question have been expressed, however, *see, e.g., Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 709 n.3 (5th Cir. 1986) (en banc) (federal court sitting in diversity must apply substantive law of the state re-

garding rate and accrual of interest on a judgment); *Weitz Co. v. Mo-kan Carpet, Inc.*, 723 F.2d 1382, 1387 (8th Cir. 1983) (Swygert, Senior Judge, dissenting) (if Congress intended to declare the rate of interest due on judgments in diversity cases, it would have done so in more explicit terms than are contained in the statute as amended in 1982).

The amended statute by its terms covers interest "on any money judgment in a civil case recovered in a district court." It is true that the Supreme Court in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), observed that in diversity cases "the courts of the state and the federal courts sitting within the state should be in harmony" on whether post-judgment interest should be allowed to run from verdicts as well as from judgments. *Id.* at 487 (quoting *Massachusetts Benefit Association v. Miles*, 137 U.S. 689, 691 (1891)). *Miles* held that when state law allowed interest to accrue from a verdict before judgment, the predecessor statute to § 1961—which also provided that interest be calculated from the "date of the judgment"—was not to the contrary because "where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived by a removal of his case to the Federal court." *Miles*, 137 U.S. at 691.

Both *Klaxon* and *Miles* thus stand for the merely permissive proposition that a state law allowing post-judgment interest to accrue from a date earlier than court entry of the judgment should be respected in diversity cases.[2] More-

[2] Bailey asserts in his brief that both Tennessee and California law, which provide the forum and underlying substantive law that governs the fraud claim in this case, would permit accrual of post-judgment interest from the first judgment. *See Bailey v. Chattem, Inc.*, 684 F.2d at 392-93; *American Buildings Co. v. DBH Attachments, Inc.*, 676 S.W.2d 558 (Tenn. App. 1984); *Stockton Theatres, Inc. v. Palermo*, 55 Cal. 2d 439, 11 Cal. Rptr. 580, 360 P.2d 76 (1961); *Snapp v. State Farm Fire & Casualty Co.*, 60 Cal.2d 816, 36 Cal. Rptr. 612, 388 P.2d 884 (1964). In view of our determination *infra* that federal, not state law, governs the question of accrual of post-judgment interest, we express no opinion on the result reached applying state law.

over, *Klaxon* and *Miles* were decided before later elaboration of the *Erie* doctrine had taken place.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court held that "Congress has no power to declare substantive rules of common law applicable in a State. . . ." In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court provided the clarification that when a federal rule and a state law conflict, the state law must give way so long as Congress has the constitutional power to regulate an area which is "rationally capable of classification as either" substantive or procedural. *Id.* at 472. While prejudgment interest is a substantive aspect of damages in a diversity case and is thus properly viewed as a matter of state law, post-judgment interest is at least "rationally capable of classification" for *Erie* purposes as procedural. Although the primary purpose of post-judgment interest is to compensate a successful plaintiff for the time between his entitlement to damages and the actual payment of those damages by the defendant, post-judgment interest also serves a salutary housekeeping purpose for the forum by creating an incentive for unsuccessful defendants to avoid frivolous appeals and by minimizing the necessity for court-supervised execution upon judgments. *See Weitz*, 723 F.2d at 1386-87; S. Rep. No. 275, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 40.

Our conclusion is buttressed by Justice Harlan's concurrence in *Hanna* and by the most recent Supreme Court expression in this area. In *Hanna*, Justice Harlan expressed the view that state law should govern only the "primary stages of private activity" of the parties from which litigation may arise. 380 U.S. at 475-77 (Harlan, J.,

concurring). Accrual of post-judgment interest is hardly the type of "primary . . . private activity" that would form the basis of business planning; nor does it seem likely that a somewhat more liberal rule in the federal courts would result in forum-shopping.

In *Burlington Northern Railroad Co. v. Woods*, 107 S.Ct. 967 (1986), the Court held that a *Hanna*-type "conflict" existed between the federal standard for assessing penalties for frivolous appeals, a broad discretionary standard, and an Alabama statute that imposes a mandatory penalty upon judgments that are affirmed on appeal. *See id.* at 971 & n.5 (citing Fed. R. App. P. 37, 38; 28 U.S.C. § 1961). *Woods* clarifies *Hanna* by providing that state law must give way to the federal standard even though it is discretionary. The *Woods* rationale suggests that a federal rule should be applied here rather than applying a state rule under the *Klaxon-Miles* line of reasoning. Federal law therefore governs the question of which judgment should be used in determining the date when interest begins to run in this case. *Accord, Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382 (8th Cir. 1983) (majority opinion); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1542 (11th Cir. 1985).

B.

Chattem argues that interest can accrue only from the judgment entered after retrial because the earlier vacated judgment has become a nullity. This view is based on a formalistic reading of the statutory phrase "date of entry of the judgment" favored in the Second, Eighth,[3] and Tenth Circuits but rejected in our own and four other circuits and at least impliedly disfavored by the Supreme Court. We agree with the majority view that the statutory

[3] A recent Eighth Circuit case, however, without reference to the earlier case law, appears to adopt a contrary view. *See Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985).

phrase must be interpreted broadly to effectuate the purposes of post-judgment interest. *See generally*, Comment, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019 (1955) (hereinafter *Interest on Judgments*).

In *National Bank v. Mechanics' National Bank*, 94 U.S. 437 (1876), the Court allowed interest pursuant to the predecessor to § 1961 to accrue from a demand for payment which, although not reduced to judgment, was "proved to the satisfaction of the comptroller" and therefore was "of the same efficacy as judgments, . . . occupied the same legal ground," and hence was "within the equity, if not the letter, of these statutes." *Id.* at 439.

This Circuit and the First, Third, Fifth, and Ninth Circuits have taken this "equity of the statute" approach to hold, in a proper case, that post-judgment interest can accrue from an event other than the final judgment entered by the district court. *See, e.g., United States v. Bank of Celina*, 823 F.2d 911 (6th Cir. 1986) (district court modification of district court judgment without intervening appeal); *Swartzbaugh Manufacturing Co. v. United States*, 289 F2d 81 (6th Cir. 1961) (judgment reduced on appeal in Contract Appeals case not subject to § 1961); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971) (judgment reduced on appeal); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987) (verdict); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986) (en banc) (interest available upon JNOV reversal, but rejected on equitable grounds); *Louisiana & Arkansas Railway Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944) (appellate reversal of JNOV for defendant; interest accrued from the verdict for plaintiff "when the judgment should have been entered"); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983) (reversal of JNOV for defendant); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672 (9th Cir. 1973) (damages reduced on appeal); *see generally Interest on Judgments* at 1048 ("the real issue

is who should bear the cost resulting from the loss of use of the money").

Chattem argues that this entire line of cases can be distinguished because the amount of damages due Bailey never was *ascertained* until judgment upon retrial, citing dictum in *Turner*, 702 F.2d at 754-56, and case law from other circuits, including *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 466 U.S. 936 (1980); *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977); and *Powers v. New York Central Railroad Co.*, 251 F.2d 813 (2d Cir. 1958). These last three cases, while perhaps susceptible of an interpretation that they *could* have been decided on an "ascertainment" ground, in fact were grounded upon a *per se* rule that the § 1961 "judgment" must be the judgment upon remand. *Compare Powers*, 251 F.2d at 818 ("The delay in the entry of the proper judgment was necessary in the sense that time for appellate reviews was required.") (quoting *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443, 445 (2d Cir.), *cert. denied*, 348 U.S. 856 (1954)) *with Powers*, 251 F.2d at 818 (majority opinion "an ironbound, inequitable and illogical rule") (Lumbard, J., dissenting); *see Ashland Oil*, 607 F.2d at 336; *Hysell*, 559 F.2d at 476-77.

The Ninth Circuit also has rejected the *Turner* "ascertainment" theory. In *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985), post-judgment interest was permitted to accrue from the initial date of judgment after a jury verdict was vacated and remanded for a new trial to determine liability and damages under a different standard of liability. The second jury again found liability and awarded nearly double the amount of damages awarded originally. *See id.* at 1298-1300 (relying on *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1311 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982)).

Twin City viewed the award of interest in circum stances analogous to this case as mandatory, not discretionary. 676 F.2d at 1311. We would not go so far. *See Affiliated Capital*, 793 F.2d at 709-10.

Determining the "equity of the statute" in a case like this requires an inquiry into the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment. In this case, our Court's affirmance of liability, coupled with our determination that "some damages" would be due upon retrial, makes it equitable to allow interest to accrue from the date of the first judgment upon remand. The retrial of the damages issue was tried upon the same theory of liability as before. Liability for damages had already been determined; what remained was the measurement of damages.

The plaintiff concedes that equity requires that interest should run only on the first $400,000 of the second judgment rather than the full $627,000. We therefore conclude that when the measurement of damages found by a second, properly instructed jury includes within it a lesser amount of damages which was also found by the jury in the first trial, considerations of equity lead us to run interest on that lesser amount from the date of the first judgment.

Chattem argues that running interest on that portion of the second judgment which was included in the first judgment creates a double-counting problem. Relying on the testimony of the plaintiff's economic expert, Chattem asserts that the portion of the 1983 jury's award attributable to past damages included a Consumer Price Index-based adjustment for the period from 1981 to 1983. Chattem argues that the time value of the 1980 damages award was thus taken into account in the 1983 award. To also allow interest to accrue on that award will therefore result in the payment of interest on an award which has already been adjusted to compensate for the passage of time. This

argument ignores the underlying rationale for the testimony of the plaintiff's expert. The expert adjusted the values for each year in accordance with the CPI because the contract was tied to the CPI. Each year, Bailey was to be paid $32,400 in 1975 dollars (minus an offset for consulting). Therefore, the adjustments made by Bailey's expert did not take into account the time value of the wages already due under the contract. He merely calculated the amount that was actually due each year. The same process was used to determine future earnings. The future earnings were brought back to present value, but the past earnings were *not* adjusted upward to reflect their 1983 value.

If the 1980 jury had calculated future earnings on the basis of CPI projections, their results for the period between 1981 and 1983 might have been different than those of the 1983 jury, since the later jury could rely on actual data rather than projections. Depending on the discrepancy between the projections and the actual data, this could result in either a windfall or a shortfall for Bailey. However, it is impossible to determine the amount of this windfall, if such a windfall was created. We will not engage in second-guessing a jury when doing so would require us to speculate as to the figures relied upon in jury deliberations.

Therefore, as long as the entire amount of the $400,000 1980 judgment was included within the 1983 judgment, interest on the $400,000 should run from 1980. In other words, interest should run on the entire amount of the 1980 judgment unless the 1980 value of the 1983 judgment is less than $400,000. For the 1980 value of the 1983 judgment to be that small, a discount rate of over 16% would have to be applied. While we cannot determine what discount rate would have been used in 1980 to determine the present value of that portion of the earnings stream which was attributable to the period between 1981 and 1983, it is clear that no reasonable jury would have relied

on a discount rate as large as 16%. It is therefore safe to say that the entire 1980 award was included within the 1983 award, and that therefore interest on the $400,000 attributable to the 1980 award should run from 1980.

C.

The final issue is what rate of interest to apply. The first judgment was entered more than two years before the effective date of the 1982 amendment to § 1961. Courts have disagreed over whether to apply the federal method of determining interest to judgments entered before October 1, 1982. A majority of circuits have concluded that the amended statute should apply only to judgments entered after its effective date. *See Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987) (collecting cases). *But see R.W.T. v. Delton*, 712 F.2d 1225, 1234-35 (8th Cir.) (holding that the amended statute should apply to a pre-effective date judgment for the entire post-judgment period), *cert. denied*, 464 U.S. 1009 (1983).

The issue is whether "to apply the law in effect at the time [a court] renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board*, 416 U.S. 696, 711 (1974).

The Court in *Campbell* undertook a comprehensive review of the case law and sparse legislative history in this area, which we will not reiterate here. *See Campbell*, 809 F.2d at 568-76. We agree with the Ninth Circuit that what little legislative history exists on the 1982 amendments indicates that Congress did not intend the new method of computing interest to apply to judgments entered before the act's effective date—at least for interest accruing before the effective date. We also agree that it is not unjust to impose interest at the Treasury bill rate *after* the act's effective date. *See id.* at 574.

IV.

Accordingly, the order of the Magistrate is reversed and remanded for calculation of post-judgment interest consistent with this opinion. The calculation of interest should use the applicable state rates from October 27, 1980 to October 1, 1982. From October 1, 1982, the effective date of the amendment to § 1961, to the 1983 judgment date and thereafter the calculation should use the applicable § 1961 rates.

KRUPANSKY, concurring in part, dissenting in part. I concur with the majority in its disposition of this case in all respects except that I would not apply the post judgment interest rate mandated by the amended version of 28 U.S.C. § 1961 retroactively to the October 27, 1980 judgment date assigned by the majority in its opinion because retroactive application would conflict with the clear and concise language of § 1961, which became effective on October 1, 1982.

An objective analysis of the pertinent statutory language of § 1961 which provides that "interest *shall* be calculated *from the date of the judgment*, at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately *prior to the date of the judgment*", reflects a congressional intent of prospective and not retroactive effect of its enactment of the statute.

Initially, in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), the Supreme Court advised that a court is to apply the law, in effect, at the time it rendered its judgment, unless such action would result in manifest injustice, or the legislative history of an enactment directs the contrary.

Mindful of the pronouncements of *Bradley*, my attention is directed to the Fifth Circuit's comments in *Brooks v. United States*, 757 F.2d 734, 741-742 (5th Cir. 1985)

wherein that court in commenting upon the Second Circuit's analysis of the issue at bar in *Litton Sys. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir.), *cert. denied.* 464 U.S. 1073 (1984) stated:

> In the instant case, a fair construction of the FCIA leads to the conclusion that Congress did not intend for the T-bill rate to apply to judgments entered prior to the effective date of the FCIA. The statute directs that the "interest shall be calculated *from the entry of the judgment* at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately *prior to the date of the judgment*." 28 U.S.C. § 1961(a) (emphasis supplied). Section 402 of the FCIA provides that the act "shall take effect on October 1, 1982." As the Second Circuit noted, the conjunction of the provision creating the effective date of the statute and the "statutory direction to calculate a rate based [on the T-bill rate] . . . 'immediately prior to the date of the judgment' is a strong indication that Congress expected the new formula to apply only to judgments entered after the effective date of the statute." *Litton*, 746 F.2d at 174.
>
> Moreover, this result is consistent with the practice of courts in applying and interpreting the FCIA's amendments to section 1961. In providing for the effective date of the FCIA, Congress noted, "The delay is intended to provide time for planning the transition and for permitting the bar to become familiar with the provisions." S.Rep. No. 97-275, 97th Cong., 1st Sess. (1981), U.S. Code Cong. & Admin. News 1982, pp. 11, 42.

In *Litton*, the Second Circuit, recognizing the dilemma posed by the retroactive application of § 1961 as suggested by the majority opinion herein, stated:

> If amended section 1961 were applied to judgments entered before its effective date but with interest at an increased rate accruing only from the effective date, choice would have to be made as to the applicable rate. Litton contends that the rate should be the average coupon yield of Treasury bills auctioned just prior to June 30, 1981, the date the judgment entered. That makes no economic sense at all and could not have been intended by Congress. Since Litton's judgment was properly accruing interest at 9% from the date of its entry until at least October 1, 1982, it would be an unwarranted windfall to have it accrue interest thereafter at a rate determined by market conditions 15 months earlier. On the other hand, if the rate accruing from the effective date of the statute was the average coupon yield of Treasury bills auctioned just prior to that effective date, the result would be economically defensible, but hopelessly inconsistent with the terms of the statute, which tie the applicable rate to the date of the judgment. We therefore reject Litton's fall-back position, *but see Hangards, Inc. v. Ethicon, Inc.*, 552 F.Supp. 820 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984), and construe amended section 1961 to have no application to judgments entered before October 1, 1982.

Litton Sys. v. American Tel. & Tel. Co., 746 F.2d 168 (2d Cir.), *cert. denied*, 464 U.S. 1073 (1984), *see also Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943 (7th Cir. 1981); and *United States v. Dollar Rent a Car Systems, Inc.*, 712 F.2d 938, 9410 n.5 (4th Cir. 1983).

Because I conclude that the reasoning and disposition of the Fifth and Second Circuits in *Brooks* and *Litton*, respectively, are more persuasive than the rationale of the Ninth Circuit in *Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987), I would apply the pre-1982 version of § 1961 which would, in turn, apply the post judgment interest rate as prescribed by the Tennessee statute to the entire 1980-83 post judgment period in issue.

APPENDIX B

No. 86-6188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESLEY T. BAILEY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
CHATTEM DRUG AND CHEMICAL COMPANY,	)	
	)	
	)	
Defendant-Appellee.	)	

Decided and Filed March 15, 1988

Before: MERRITT, KRUPANSKY and RYAN, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

WESLEY T. BAILEY,	)	
	)	
Plaintiff,	)	
	)	CIV-1-79-56
v.	)	
	)	
CHATTEM, INC.,	)	
	)	
Defendant.	)	

Decided and Filed October 10, 1986

MEMORANDUM

This matter is presently before the Court on the plaintiff's motion to amend the final order (Court File No. 158). Specifically, the plaintiff seeks additional interest on the judgment in this matter in two respects. First, the plaintiff submits that the interest on the August 5, 1983 judgment should be calculated at the rate of 10.25 percent, rather than 10 percent. Second, the plaintiff seeks post-judgment interest at the rate of 10 percent on the judgment entered after the first trial in this case on October 27, 1980 through the date of the second trial, August 5, 1983. The Court will address these questions in turn.

The interest payable on money judgments in a civil case in federal district court is governed by 28 U.S.C. §1961. That statute provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of that State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two (52) week United States Treasury Bills settled immediately prior to the date of the judgment.
>
> (b) Interest shall be computed daily to the date of payment . . ., and shall be compounded annually.
>
> (c) (4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

28 U.S.C.A. §1961 (West Supp. 1985). The applicable rate under this section for a judgment entered August 5, 1983 is 10.25 percent.

Defendant Chattem claims that Section (a) of the above quoted statute is inapplicable as the judgment in this case was rendered after a trial before the United States Magistrate, a judgment it claims was not rendered by a district court.[1] This argument is derived from Chattem's attack on the constitutionality of the Magistrates Act. Such arguments have been rejected in this circuit and by all circuits considering the issue. *See, e.g., KMC Company, Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985). Accordingly, the defendant will be required to pay an addi-

[1] While Chattem abandoned this argument at the hearing of June 25, 1986, the Court feels that it should be addressed, albeit briefly.

tional sum reflecting the proper interest rate of 10.25 percent.

The plaintiff also claims that his award should include interest on the October 27, 1980 fraud judgment for the period between that date up through the date of judgment in the second trial. This question calls for a determination of whether August 27, 1980 is a proper "date of entry of the judgment" under 28 U.S.C. §1961, for purposes of assessing post-judgment interest.

To support his argument, the plaintiff primarily relies on a series of Ninth Circuit cases, the most recent of which is *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir.), *cert. denied*, 105 S. Ct. 963 (1985). *Handgards* involved a patent and antitrust action involving disposable plastic gloves for use in the health care industry. A jury verdict for *Handgards* was set aside by the Ninth Circuit and set for a new trial. After a second jury trial, *Handgards* was again awarded a substantial verdict. In addition to the jury award, the district court awarded substantial post-judgment interest running from the time of the first trial up through the date of judgment in the second trial. In affirming that award, the Ninth Circuit stated:

> When there are two judgments for a plaintiff, interest from the date of, and on the amount of, the first judgment also can be viewed as either interest or damages. If the second judgment includes as damages such an amount, post-judgment interest on the amount of the first judgment is not recoverable. It has already been accounted for as damages. Where, however, it has not been included in damages, it can be recovered as post-judgment interest.

743 F.2d at 1300. The Court finds this reasoning unpersuasive.

Though the Sixth Circuit has not yet decided this issue, several circuits have held contrary to the *Handgards* de-

cision. In *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979), the plaintiff urged the Court to award post-judgment interest from the date of the first judgment and not the date of the judgment after remand. In denying this request, the Tenth Circuit stated that "in view of the extend [sic] to which the case was reversed, the 'judgment' for the purpose of interest was that entered by the trial court on remand." *Id.* at 336.

The Eighth Circuit has held similarly. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977). In *Hysell*, the Court interpreted Title 28 U.S.C. §1961's language stating "date of the entry of the judgment," as meaning the date of the entry of judgment after remand. The Court specifically stated that "[i]nterest does not accrue on a vacated judgment." *Id.* at 476. *See Riha v. International Telephone & Telegraph Corp.*, 553 F.2d 1053 (8th Cir. 1976). *Cf. Merchants Matrix Cut Syndicate, Inc. v. United States*, 284 F.2d 456, 459 (7th Cir. 1960) (post-judgment interest awarded from date of judgment after remand pursuant to 28 U.S.C. §1346).

In this case, when the Sixth Circuit vacated the money judgment previously awarded the plaintiff, that judgment became a nullity. *Cf. Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985) (the general rule is that a vacated judgment is deprived of its conclusive effect). *See Hinton v. McNeil*, 5 Ohio 509, 511 (1832) (cited by *Dodrill* with approval) ("[b]y reversal a judgment is made void, and the matters, litigated in the case reversed, again become open for litigation between the same parties"). *See also Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977).

Therefore, in the present case, even though liability had been established, there was no money judgment for which interest could be awarded. To award post-judgment interest in this situation would be purely speculative. Though the amount of damages determined by the second trial could have been the same or greater than initially awarded,

conceivably the amount could have been much less. Even as pre-judgment interest, the award seems inappropriate in this case.

The rationale for pre-judgment interest or post-judgment interest is the certainty of the award. D. Dobbs, *Remedies*, §3.5 at 173 (1973). "The basis for the rule is that it affords interest only on liquidated or *ascertainable* claims but not on others." *Id.* (emphasis added). In *Southern Painting Co. of Tenn. v. United States*, 222 F.2d 431, 435 (10th Cir. 1955), the Court stated that: "Obviously, it would be unfair and inequitable to exact interest when the amount of an asserted claim is in dispute in good faith and could not be determined until after a judicial inquiry and sifting of all the facts." *Cf. Hermann v. Gleason*, 126 F.2d 936 (6th Cir. 1942) (court finding that the intent was for interest to accrue only when the amount due was finally fixed by arbitration).

Accordingly, plaintiff's motion for additional interest based on an award of post-judgment interest from the date of the original award will be denied. An order will enter in accordance with this memorandum.

/s/ JOHN Y. POWERS
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

WESLEY T. BAILEY,	)	
	)	
Plaintiff,	)	
	)	CIV-1-79-56
v.	)	
	)	
CHATTEM, INC.,	)	
	)	
Defendant.	)	

O R D E R

In accordance with the accompanying memorandum, it is hereby ORDERED that:

(1) The defendant pay such interest on the amount of the August 5, 1983 judgment from that date to the date of tender as will promptly reflect the interest rate of 10.25 percent. In addition, defendant is ordered to pay interest on the interest not paid until the date on which this further amount is tendered to the Court; and

(2) Plaintiff's claim for post-judgment interest accruing from the date of October 27, 1980 through August 5, 1983 is hereby DENIED.

ENTER.

/s/ JOHN Y. POWERS
United States Magistrate

APPENDIX D

No. 80-5439

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESLEY T. BAILEY,
Plaintiff-Appellee,

v.

CHATTEM, INC.,
Defendant-Appellant.

Decided and Filed August 3, 1982

Before: ENGEL and KENNEDY, Circuit Judges; and ENSLEN, District Judge.

J U D G M E N T

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District court in this cause be and the same is hereby affirmed in part, reversed in part, and remanded for further proceedings consistent with the opinion of this Court.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

/s/ AUDREY CROCKETT
Deputy Clerk

Issued as Mandate:
September 27, 1982

APPENDIX E

JUDGMENT IN A CIVIL CASE

	District
UNITED STATES DISTRICT COURT	EASTERN DISTRICT OF TENNESSEE
Case Title	Docket Number
WESLEY T. BAILEY	CIV 1-79-56
v.	Name of Judge or Magistrate
	Hon. Roger W. Dickson,
CHATTEM, INC.	U. S. Magistrate

X *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

____ *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff WESLEY T. BAILEY recover of the defendant CHATTEM, INC. the sum of $627,000.00, with interest thereon at the rate provided by law, and his costs of action.

Dated at Chattanooga, Tennessee this fifth day of August, 1983.

Filed August 5, 1983
Ent'd Order BK 29-444
KARL D. SAULPAW, JR., Clerk
By MARIE L. STANFILL Dep. Clerk

/s/ MARIE L. STANFILL

Clerk	Date
KARK D. SAULPAW, JR.	August 5, 1983
By Deputy Clerk	
/s/ MARIE L. STANFILL	

CHAT:17270

APPENDIX F

No. 83-5424
84-5193

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESLEY T. BAILEY,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL from the
	)	United States District
v.	)	Court for the Eastern
	)	District of Tennessee.
CHATTEM, INC.,	)	
	)	
Defendant-Appellee.	)	

Decided and Filed October 16, 1985

Before: MARTIN and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

Per Curiam. The question before us is whether the evidence presented to the jury was properly admitted and was sufficient to support the verdict in a trial to determine the amount of damages for fraud. This court previously affirmed the lower court's judgment of liability for fraud in obtaining the assignment of patent rights, but reversed the award of damages and remanded for a new trial on that issue. 684 F.2d 386 (6th Cir. 1982). On retrial, the jury awarded Bailey $627,000. Chattem appeals, arguing primarily that the expert testimony was not reliable and was not sufficient to support the amount of damages awarded. On consideration of this argument and the other issues raised, we find that no reversible error occurred in

the proceedings in the lower court, and, accordingly, we affirm the judgment.

The complicated facts of this patent dispute are fully explicated in our prior opinion in this litigation. 684 F.2d 386 (6th Cir. 1982). In the prior appeal, this court found that, although the promise sued upon contained a provision that payments would "somehow" be tied to a cost of living index, there was insufficient proof presented to the jury to define that provision:

> Bailey argues that the jury's award could legitimately be larger than this [the total of the remaining payments, $222,679] to take into account future inflation. However, here are measure of damages was set by a proposed contract, and the jury could not assume the payments under the contract would vary unless the contract so provided. Though there was a reference in the evidence to inclusion of a cost of living clause "somehow" tied to 1975 prices, *without further definition this term is too vague for the jury to assign any non-arbitrary value to it.* 'To set a quantifiable damage figure arbitrarily is impermissible.' *Agricultural Services Ass'n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072 (6th Cir. 1977). (emphasis added).

684 F.2d at 395. Chattem argues that the evidence presented on retrial did not sufficiently define the vague term and that the expert testimony was inadmissible because it did not prove the actual intent of the parties. Chattem also contends that the trial court erred in admitting expert testimony that was not based on reliable methods. We disagree.

We note that the admissibility of expert testimony lies in the sound discretion of the trial court and is reviewable only for an abuse of discretion. *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1070 (9th Cir. 1975); 3 J. Weinstein, Evi-

dence ¶702[02] at n.15 (1982). In diversity cases, we resolve questions of the sufficiency of evidence according to the test of sufficiency under state law, applying the law of the forum state. *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 813 (6th Cir. 1982). In Tennessee, the appellate court does not re-weigh the evidence, but considers only whether there is material evidence to support the verdict, taking the "strongest legitimate view" of the evidence that favors the appellee, disregarding contrary evidence, and indulging "all reasonable inferences to uphold the verdict." *Keller v. East Tennessee Production Credit Association*, 501 S.W.2d 810, 811-12 (Tenn. App. 1973).

Although there was little direct evidence on the intent of the parties, Bailey presented abundant evidence on the operation and application of cost-of-living indices. Bailey presented an economics expert who testified regarding cost-of-living adjustments and rates of inflation, and a patent expert who testified regarding the value of Bailey's invention. Chattem presented no experts of its own. We find that Bailey's experts were properly qualified and their methods were sufficiently reliable. *See Manino v. International Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981). Accordingly, we conclude that the lower court did not abuse its discretion in admitting their testimony and that the testimony was sufficient to define the value provision and support the jury's award of damages.

We find the other issues raised to be without merit. This court has ruled that 28 U.S.C. §636(c) is constitutionally valid. *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 75 (6th Cir. 1985). The district court did not err in refusing to allow Chattem to withdraw its consent to the magistrate's presiding at trial and entry of judgment under section 636(c). We affirm the denial of the motion to vacate under Federal Rule of Civil Procedure 60(b)(4) and the denial of the motion for judgment n.o.v. or new trial.

This court was informed at oral argument that the parties agreed that the motion to dismiss the first appeal, No. 83-5424, has been rendered moot by the subsequent appeal from the final judgment and that the parties consider all issues briefed in both appeals to be properly before the court. We therefore dismiss Bailey's motion seeking dismissal of the interlocutory appeal.

For the foregoing reasons, the judgment of the lower court is AFFIRMED.

ISSUED AS MANDATE: NOVEMBER 7, 1985
COSTS: FOR APPELLEE
$105.00 for printing
/s/ NANCY SCHULKENS

CHAT:17387

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1702

IN THE
Supreme Court of the United States
October Term, 1987

CHATTEM, INC., a corporation,

Petitioner

v.

WESLEY T. BAILEY,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT WESLEY T. BAILEY IN OPPOSITION

CARLOS C. SMITH
Counsel of Record
EDWARD D. MEYER
Strang, Fletcher, Carriger,
Walker, Hodge & Smith
400 Krystal Building
One Union Square
Chattanooga, TN 37402

Table of Contents

		Page
Table of Contents		i
Table of Authorities		ii
Questions Presented		1
Statement of the Case		1
Argument		5
1.	The Court of Appeals correctly interpreted 28 U.S.C. Section 1961 as it applies to the facts of this case.	5
2.	There is no substantial dispute among the Circuits on the interpretation of 28 U.S.C. Section 1961.	7
3.	The decision of the Court of Appeals conflicts with neither Briggs nor Fed.R.App.Proc. 37.	10
4.	The decision of the Court of Appeals does not violate a supposed right of Chattem under state law.	14
Conclusion		15

Table of Authorities

Cases	Page
Affiliated Capital Corporation v. City of Houston, 793 F.2d 706 (5th Cir. 1986)	7, 10
American Buildings Company v. DBH Attachments, Inc., 676 S.W.2d 558 (Tenn. App. 1984)	11
Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979), cert. den. 446 U.S. 936 (1980).	7, 8
Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir. 1988).	5, 7, 10, 14
Bailey v. Chattem, Inc., 684 F.2d 386 (6th Cir. 1982), cert. den. 475 U.S. 1065 (1986)	1, 2, 6
Bailey v. Chattem, Inc., 779 F.2d 49 (6th Cir. 1985) (Memorandum decision).	2
Briggs v. Pennsylvania Railroad Company, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948)	1, 4, 10, 11, 14
Brown & Williamson Tobacco Corporation v. Walter Jacobson & CBS, Inc., No. 86-2474, 86-2475, slip. op. (7th Cir. Nov. 6, 1987)	7
G.M. Brod and Company, Inc. v. U.S. Home Corporation, 759 F.2d 1526, 1542 (11th Cir. 1985)	11

Buck v. Burton, 768 F.2d 285 (8th Cir. 1985)	8
Chattem, Inc. v. Bailey, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986).	2
Handguards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984), cert. den. 469 U.S. 1190 (1985).	7
Hawaii Housing Authority v. Midkiff, 463 U.S. 1323, 1324, 104 S.Ct. 7, 8, 77 L.Ed.2d 1426 (1983) (per Rehnquist, Circuit Justice)	13
Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977)	7
Louisiana & Arkansas Railway Co. v. Pratt, 142 F.2d 847 (5th Cir. 1944)	7
Northern Natural Gas Co. v. Hegler, 818 F.2d 730 (10th Cir. 1987)	8, 9
Poletto v. Consolidated Rail Corporation, 826 F.2d 1270 (3d Cir. 1987)	7
Powers v. New York Central Railroad Co., 251 F.2d 813 (2d Cir. 1958)	7, 9, 10
Pratt v. Louisiana & Arkansas Railway Co., 135 F.2d 692 (5th Cir. 1943)	10
Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111 (5th Cir. 1985)	13

Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987) 8

United States v. Bank of Celina, 823 F.2d 911 (6th Cir. 1986) 7

United States v. Michael Schiavone and Sons, Inc., 450 F.2d 875 (1st Cir. 1971) 7

Statutes

28 U.S.C. Section 1961 passim

Fed.R.App.Proc.2 13

Fed.R.App.Proc.37 1, 4, 10, 12, 13

Other Authorities

Comment, Interest on Judgments in the Federal Courts, 64 Yale L.J. 1019 (1955) 5

Questions Presented

1. Does 28 U.S.C. Section 1961 permit a Court of Appeals to award post-judgment interest for the period between the first trial of an action and its retrial on the issue of damages only, as to so much of the original judgment as was ultimately awarded in the second trial and affirmed on appeal.

2. Does the action of the Court of Appeals in this case conflict with the ruling of this Court in Briggs v. Pennsylvania Railroad Company, 334 U.S. 304 (1948) or Federal Rule of Appellate Procedure 37.

Statement of the Case

The underlying action in this cause was for fraudulent misrepresentation, breach of contract, and the destruction of foreign patent rights and trade secrets, brought by plaintiff Wesley T. Bailey against defendant Chattem, Inc. Jurisdiction was based on diversity of citizenship. The facts supporting the plaintiff's basic claims are set forth in detail in the Opinion of the Court of Appeals in Bailey v. Chattem, Inc., 684 F.2d 386, 387-389 (6th Cir. 1982), cert. den. 475 U.S. 1065 (1986). Essentially, Bailey contended, and the jury found, that Chattem had defrauded Bailey of his rights to an invention. A jury trial resulted in a verdict for Bailey of $548,000 in compensatory damages and $75,000 in punitive damages for fraudulent misrepresentation, and $27,000 for breach by the defendant Chattem of an implied contractual obligation to commercialize the invention, Bailey's rights to which had been assigned to Chattem. Chattem's post-trial motions were overruled,

subject to the acceptance by Bailey of a remittitur of $148,000 with respect to the damages awarded for fraudulent misrepresentation. On appeal to the Sixth Circuit, the Court of Appeals affirmed all findings with respect to liability, and affirmed as well the award of punitive damage and damages for failure to commercialize. Bailey v. Chattem, Inc., 684 F.2d 386 (6th Cir. 1982). However, the Court of Appeals remanded for a retrial on the issue of the amount of compensatory damages for fraudulent misrepresentation, noting that it was clear that damages in some amount were justified. Bailey v. Chattem Inc., 684 F.2d 386, 396 n.12 (6th Cir. 1982), cert. den. 475 U.S. 1065 (1986). On remand, the jury returned a verdict in favor of Bailey for fraudulent misrepresentation in the amount $627,000. On appeal, the Court of Appeals affirmed once more. Bailey v. Chattem, Inc., 779 F.2d 49 (6th Cir. 1985) (Memorandum decision). Chattem's Petition to this Court seeking writ of certiorari was denied. Chattem, Inc. v. Bailey, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986).

On January 10, 1986, an Agreed Order was entered by the District Court under which Chattem tendered $779,541 into the registry of the Court, representing $627,000 as the principal amount of the judgment, and interest on that sum of $152,541. In that Order, the question of whether further interest was payable by Chattem under 28 U.S.C. Section 1961 for the period preceding the August 5, 1983 judgment was expressly reserved for future determination by the District Court, and the parties were given a schedule for addressing that question. A copy of the Order has been appended as Exhibit A. By motion filed February 7, 1986, consistent with the Trial Court's instructions, Bailey questioned the sufficiency of the interest paid on the judgment in two respects: first, with respect to post-judgment interest on the amount of the verdict of

$627,000 from the date of the verdict to the date of tender, Bailey contended that interest should be computed at the annual rate of 10.25 percent compounded annually, pursuant to the provisions of 28 U.S.C. Section 1961. Defendant Chattem had tendered interest at the rate of 10 percent, the rate under Tennessee state law. As noted in Chattem's Petition at footnote 1, Page 6, Chattem ultimately conceded that their position was incorrect, and paid interest at the higher rate requested by Bailey. Secondly, Bailey contended that Chattem should be required to pay post-judgment interest under 28 U.S.C. Section 1961 on the amount of the judgment entered October 27, 1980, through the date of the judgment of the jury on the second trial on August 5, 1983. The Trial Court denied this request by an Opinion and Order entered October 10, 1986.

On appeal, the Court of Appeals reversed the judgment of the Trial Court, and remanded with instructions that the magistrate calculate and award post-judgment interest under 28 U.S.C. Section 1961 for the period from October 27, 1980 to the 1983 judgment date and thereafter. Chattem's requests that the Sixth Circuit rehear the case, and reconsider the issue en banc, were denied, and this Petition followed.

Bailey would like to clarify several statements by Chattem in its Statement of the Case which are somewhat misleading. First, Chattem continually characterizes Bailey's claim as one for "prejudgment interest". See, e.g. Chattem's Petition at 6. This is incorrect. Bailey did not seek prejudgment interest. As both the Trial Court and the Court of Appeals clearly recognized, Bailey sought, and ultimately gained, an appropriate award of post-judgment interest under 28 U.S.C. Section 1961, the statute govern-

ing the award of post-judgment interest. Secondly, the Sixth Circuit did not hold that either Briggs v. Pennsylvania Railroad Company, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948) or Rule 37, Fed.R.App.Proc., were not binding upon it. Rather, the Court of Appeals held that those authorities had been misconstrued by Chattem. Finally, in its Petition at page 5, Chattem implies that Bailey's counsel has been sued for fraud by Bailey, and filed liens attaching Bailey's judgment. This statement can most charitably be described as misleading. Bailey's present counsel has continuously represented him from the inception of this litigation, through each trial and appeal. Counsel has not been sued for fraud by Bailey, nor did counsel seek to attach Bailey's judgment. The dispute referred to so ambiguously by Chattem involved Bailey and a separate firm of patent counsel which assisted in the trial and appeal of the action, and which is no longer involved in this litigation.

Argument

1. The Court of Appeals correctly interpreted 28 U.S.C. Section 1961 as it applies to the facts of this case.

The central issue presented by the Petition is the correctness of the Court of Appeals' reading of the statutory phrase "date of entry of the judgment" in 28 U.S.C. Section 1961 to permit, in a proper case, the accrual of post-judgment interest from an event other than the final judgment entered by the District Court. This, as noted by the Court of Appeals, is in agreement "with the majority view that the statutory phrase must be interpreted broadly to effectuate the purposes of post-judgment interest. See generally, Comment, Interest on Judgments in the Federal Courts, 64 Yale L.J. 1019 (1955) . . . " Bailey v. Chattem, Inc., 838 F.2d 149, 153 (6th Cir. 1988).

The purpose of an award of interest is to compensate the wronged person for being deprived of the monetary value of the loss that he has suffered from the time of the loss to the payment of the money judgment. The interpretation of 28 U.S.C. Section 1961 adopted by the Sixth Circuit in this case is clearly consistent with that objective. It prevents an ultimately successful plaintiff from being penalized by the time necessarily consumed by serial appeals, and it prevents a wrongdoer from retaining without penalty funds ultimately adjudged to belong to the plaintiff as compensation for his loss. The award of post-judgment interest in a case like that presented here compensates the injured plaintiff for the period that he remains less than whole as a result of error in the original judgment of the trial court. It also removes the possibility that a defendant might derive a financial advantage from prolonging the appellate process.

The justice of this interpretation of 28 U.S.C. Section 1961 is particularly apparent in this case. Here, the liability of Chattem to Bailey was established as of the date of the District Court's judgment, after the first trial, October 27, 1980. That finding of liability has stood since that date, and has never been reversed or modified. In the first appeal, the Court of Appeals did not vacate that judgment, but rather affirmed the finding of liability and remanded for a redetermination of damages. Bailey v. Chattem, Inc., 684 F.2d 386 (6th Cir. 1982), cert. den. 475 U.S. 1065 (1986). Chattem was able to avoid payment of this judgment for over five years. It would have been inequitable in the extreme to permit Chattem to further profit from its fraud on Bailey by retaining the use of the judgment amount, interest free. The award of interest under the judgment of the Court of Appeals does not penalize Chattem, for Chattem in fact has had the use of the money in dispute; rather it merely places the parties on an equal footing, and serves to compensate Bailey fully for his loss.

In its Petition at 19 et. seq., Chattem argues that the decision of the Court of Appeals conflicts with the language of 28 U.S.C. Section 1961. The basis for this supposed conflict is unclear. In any event, it is a problem with the language of the statute that does not appear to have occurred to any of the courts that have addressed the issue, regardless of what decision they ultimately reached as to the construction of the statute. There clearly is a "money judgment" in this case; the question determined by the Court of Appeals was the date from which interest on that judgment would run.

In referencing the legislative history of 28 U.S.C. Section 1961 in its Petition at 20 to argue against "prejudgment" interest, Chattem again refuses to accept that the

issue in this case involves post-judgment interest, something that, as with Chattem's argument from the language of the statute, has troubled neither the courts in this action nor those in any other case treating the issue.

2. There is no substantial dispute among the Circuits on the interpretation of 28 U.S.C. Section 1961.

The conflict among the Circuits on the proper interpretation of 28 U.S.C. Section 1961 is in fact substantially less than is implied by Chattem's argument. The Courts of Appeals in the First, Third, Fifth, Sixth, Seventh, and Ninth Circuits have clearly held that, in a proper case, post-judgment interest can accrue under 28 U.S.C. Section 1961 from an event other than the final judgment entered by the District Court. See, e.g., United States v. Michael Schiavone and Sons, Inc., 450 F.2d 875 (1st Cir. 1971); Poletto v. Consolidated Rail Corporation, 826 F.2d 1270 (3d Cir. 1987); Affiliated Capital Corporation v. City of Houston, 793 F.2d 706 (5th Cir. 1986); Louisiana & Arkansas Railway Co. v. Pratt, 142 F.2d 847 (5th Cir. 1944); Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir. 1988); United States v. Bank of Celina, 823 F.2d 911 (6th Cir. 1986); Brown & Williamson Tobacco Corporation v. Walter Jacobson & CBS, Inc., No. 86-2474, 86-2475, (7th Cir., Nov. 6, 1987); Handguards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984), cert. den. 469 U.S. 1190 (1985). The "formalistic" reading of the statute favored by Chattem has found favor only in the Second, Eighth and Tenth Circuits. See Powers v. New York Central Railroad Co., 251 F.2d 813 (2d Cir. 1958); Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977); Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979), cert. den. 446 U.S. 936 (1980). However, the Eighth Circuit appears to have abandoned its holding in Hysell, and

embraced the majority rule. See Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987); Buck v. Burton, 768 F.2d 285 (8th Cir. 1985). Furthermore, in a recent decision, the Tenth Circuit has interpreted its prior precedent as permitting an award of interest on facts essentially equivalent to those presented in this case. The case in question, Northern Natural Gas Co. v. Hegler, 818 F.2d 730 (10th Cir. 1987), is a companion case to Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979), the case relied upon by Chattem for its Tenth Circuit authority. In discussing the question of the interpretation of 28 U.S.C. Section 1961 and its prior holding in Ashland Oil, the court stated:

> In instances where there has been a trial court judgment, an appeal with reversal and remand followed by a new trial court judgment there arises an issue as to whether the first trial court judgment or the second is the "judgment" to be used to divide prejudgment and post-judgment interest. We considered this issue in Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir.), as to the remanded Oklahoma cases. We there said (607 F.2d at 336):
>
> > The plaintiff urges that postjudgment interest should commence upon the date of the first judgment and not at the end of the remand trial. However, we must hold under 28 U.S.C. Section 1961, in view of the extent to which the case was reversed, the judgment for the purpose of interest was that entered by the trial court on remand. . . .
>
> Here the "extent to which the case was

> reversed" was from the trial court's helium value determination . . . . This was a large dollar difference but the reversal was not on any basic liability errors or errors in procedure which effected the basic issues but on a dollar value, a matter of degree. It did impose a new method of valuation . . . but the reversal and remand was as to dollars. This reversal for such a purpose was not to a large "extent" or an extent sufficient to change the determinative judgment for these purposes.

Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-738 (10th Cir. 1987).

We are aware of no authority in the Fourth Circuit, D.C. Circuit, or Federal Circuit. Presumably the outstanding Fifth Circuit cases remain valid authority in the Eleventh Circuit. Thus, only the Second Circuit case cited can be said at present to stand unquestioned in its circuit as holding to the "formalistic view". See Powers v. New York Central Railroad Company, 251 F.2d 813 (2d Cir. 1958). However, we are unaware of any instance in which Powers has been either followed or cited with approval on that point in the Second Circuit.

In its Petition at pages 16 et seq., Chattem attempts to construct yet another conflict among the Circuits by contending that the First and Fifth Circuits would permit interest to be awarded from the date of the original judgment only when the judgment is either reinstated on appeal or modified on appeal and upheld as to a lesser amount. No such limitation can be gleaned from the language of the cases cited by Chattem. Certainly, the various Courts of Appeals who have discussed the question do not believe that there are "three schools of thought" as

argued by Chattem, but rather only the formalistic interpretation of Powers v. New York Central Railroad, 251 F.2d 813 (2d Cir. 1958) and the equitable construction that is the majority rule. See, e.g. Bailey v. Chattem, Inc., 838 F.2d 149, 153-154 (6th Cir. 1988); Affiliated Capital Corp. v. City of Houston, 793 F.2d 706, 710 (5th Cir. 1986).

Bailey submits that, to the extent that any conflict remains among the Circuits on the point at issue, it has in fact been effectively resolved in favor of the interpretation of 28 U.S.C. Section 1961 endorsed by the Court of Appeals in this case. Contrary to the implication of Chattem's argument, the issue does not appear to have disrupted practice in the federal courts in the decades since the decisions in Pratt v. Louisiana & Arkansas Railway Co., 135 F.2d 692 (5th Cir. 1943) and Powers v. New York Central Railroad, 251 F.2d 813 (2d Cir. 1958). This is clearly not such an issue as to require this Court's discretionary review.

3. The decision of the Court of Appeals conflicts with neither Briggs nor Fed.R.App.Proc. 37.

Chattem asserts that the decision of the Court of Appeals conflicts both with this Court's decision in Briggs v. Pennsylvania Railroad Company, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948) and Rule 37, Fed.R.App.Proc. Chattem's position appears to be based on a misapprehension as to the import both of Rule 37 and Briggs, and of the relief sought and ultimately granted in this action. As the Court of Appeals noted, Briggs holds only that a district court has no authority on remand to calculate post-judgment interest from a date earlier than its post-remand entry of judgment unless the mandate of the Court of

Appeals so directs. Rule 37 is of like import. Neither restricts the authority of the Court of Appeals to define the date from which interest shall run[1], and neither has a direct application to this case.

Chattem appears to argue that the appropriate procedural route for Bailey to have followed was to have sought to amend one or both mandates of the Court of Appeals. A motion to amend the mandate presupposes an error or inadequacy in the mandate as issued. There have been two mandates issued in this case, and neither mandate was incorrect. As noted by the Court of Appeals, the August 3, 1982 mandate of that Court was silent on the subject of interest, and appropriately so. The Court did not order entry of a judgment for money damages on Bailey's action for fraud, but affirmed the finding of liability and ordered a new trial on damages. The issue of interest was not raised by the parties, and was not dealt with by the Court of Appeals. That is not surprising. At that time, prior to the 1982 amendment of 28 U.S.C. Section 1961, state law governed the award of interest in a diversity action such as this. See e.g., G.M. Brod and Company, Inc. v. U.S. Home Corporation, 759 F.2d 1526, 1542 (11th Cir. 1985). Under Tennessee law, applicable at that time, interest would have been payable for the period between the October 27, 1980 judgment and the August 5, 1983 judgment on the same basis that Bailey has received from the Court of Appeals here, without any express mention in the mandate. See American Buildings Company v. DBH Attachments, Inc., 676 S.W.2d 558, 566-567 (Tenn. App. 1984). The August 5, 1983 judgment of the District Court

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[1] In Briggs, the Court of Appeals had reversed an award of interest made by the District Court; the Court of Appeals itself had declined to award interest.

awarded Bailey $627,000 "with interest thereon at the rate provided by law". The judgment in that case was not modified or reversed on appeal. Rather, it was affirmed in all respects. Under Rule 37, the mandate that issued upon the affirmance of the 1983 judgment should not have contained instructions with respect to the allowance of interest. In such instance, Rule 37 provides that: "whatever interest is allowable by law shall be payable from the date that the judgment was entered in the District Court". This is the requirement of 28 U.S.C. Section 1961 as well. The dispute between the parties centers on precisely what interest is "allowable by law", and from what "date" this should be computed. It was proper for the magistrate to determine, upon affirmance, what interest was in fact provided by law. There was no basis for recourse to the Court of Appeals until the trial judge had made that decision, and determined which interpretation of 28 U.S.C. Section 1961 he would accept.

This approach to the resolution of the dispute between the parties as to the proper interpretation of 28 U.S.C. Section 1961 was tacitly accepted by Chattem by its approval of the January 10, 1986 Agreed Order, appended as Exhibit A, in which the question of whether further interest was payable by Chattem was expressly reserved for future determination by the District Court. It is unclear how it could have been resolved otherwise. Surely it would have been inappropriate to raise before the Court of Appeals a question of statutory construction hitherto unbriefed by the parties and untouched by the District Court, and request the Court of Appeals to issue an advisory opinion to foreclose a possible misinterpretation of 28 U.S.C. Section 1961 by the trial court upon remand. The incongruity of Chattem's position on this point is apparent if one considers what their posture would be if the trial court had agreed with Bailey as to the proper interpretation of 28 U.S.C. Section 1961. Under Chattem's analysis it would have been incumbent upon Chattem to be sufficiently prescient to have moved for a timely recall of the mandate-either in November of 1985, or perhaps in August of 1982-to include an express direction to the trial judge not to award interest.

The issue pressed by Chattem in fact is immaterial to the ultimate outcome. Regardless of the manner in which the question came before it, the Court of Appeals surely had the power to reach the merits and achieve the result it clearly believed to be just under the facts and law. Contrary to the implication of Chattem's argument, the recall of the mandate "lies within the inherent power of the Court of Appeals and is reviewable only for abuse of discretion". Hawaii Housing Authority v. Midkiff, 463 U.S. 1323, 1324, 104 S.Ct. 7, 8, 77 L.Ed.2d 1426 (1983) (per Rehnquist, Circuit Justice). A Court of Appeals may, if it wishes, treat an appeal as a motion to recall the mandate. Compare Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111 (5th Cir. 1985). Any restrictions in Rule 37, Fed.R.App.Proc. may be suspended by the Court of Appeals in a given case on its own motion. Fed.R.App.Proc.2. Even granting Chattem's position for the purposes of argument, Chattem is at most protesting the procedural details of the manner in which the Court of Appeals reached a result it clearly had the power to achieve.

The Court of Appeals in the case, as did the Court of Appeals in Briggs, has in effect done no more than instruct the Magistrate as to how its mandate was to be implemented with respect to the award of post-judgment interest under 28. U.S.C. Section 1961. A Court of Appeals has the authority both to construe its own mandate and to instruct its trial courts as to how its mandates are to be construed in the future, consistent with the Court's

interpretation of the applicable statutes. There was no violation of the holding in Briggs in this case.

4. The decision of the Court of Appeals does not violate a supposed right of Chattem under state law.

Chattem has also argued that the decision of the Court of Appeals in some manner subverts Chattem's "right under state law to insist that the present value calculation be made as of the same date that post-judgment interest begins accruing thereon". (Chattem's Petition at 15). Chattem did not advance this argument before the Court of Appeals as a reason for upholding the District Court's decision, and thus properly should not raise it here. In any event, the basis for Chattem's complaint is unclear. Chattem has cited no authority for such a "right" under state law, and it is not obvious how the Court of Appeals' judgment would conflict with such a right in any event. Certainly, as noted by the Court of Appeals, federal law governs the choice of which judgment should be used in determining the date when interest begins to run under 28 U.S.C. Section 1961 in a diversity action. Bailey v. Chattem, Inc., 838 F.2d 149, 153 (6th Cir. 1988). Chattem does not question this ruling.

Conclusion

Respondent Bailey asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted this
13th day of May, 1988.

Carlos C. Smith
Counsel of Record
Edward D. Meyer
Strang, Fletcher, Carriger,
Walker, Hodge & Smith
400 Krystal Building
One Union Square
Chattanooga, TN 37402
(615)265-2000
Counsel for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

WESLEY T. BAILEY

Plaintiff

-vs- CIV-1-79-56

CHATTEM, INC.

Defendant

ORDER

Chattem, Inc. having appealed to the United States Court of Appeals for the Sixth Circuit from the judgment of this Court entered on August 5, 1983 (the "Judgment"), and said Court having issued its mandate dated November 7, 1985, wherein it was ordered and adjudged that the Judgment be affirmed;

Now upon the motion to intervene filed in behalf of Messrs. Poms, Smith, Lande & Rose and the motion of Chattem, Inc. to satisfy the Judgment by the payment of the same into the registry of this Court, and it appearing to the Court that there is a possible dispute as to the amount of interest claimed by the Plaintiff as due on said judgment;

It is hereby ORDERED AND DECREED as follows:

1. Chattem, Inc. shall tender unto the Clerk of this Court a check in the sum of $779,541 (the "Check") representing payment of the principal due on the Judgment in full, $627,000, and ~~accrued~~ interest in the amount of $152,541.

2. The Clerk shall deposit said Check, in one or more interest bearing accounts to be held by the Clerk at the First American National Bank, Chattanooga, Tennessee, for distribution as follows:

(a) The Clerk shall hold the sum of One Hundred Thirty-Six Thousand, Five Hundred Twenty-Two and 46/100 Dollars ($136,522.46) into an interest bearing account at First American National Bank in Chattanooga, Tennessee, pending further Order of this Court upon the motion to intervene filed in behalf Messrs. Poms, Smith, Lande & Rose asserting an attorneys' lien against the proceeds in the judgment in this case in which order the Court will determine the merits of the motion and to whom the sums in the account established under this paragraph shall be distributed.

(b) After deducting that amount specified in paragraph (a) hereof for retention in the bank account to be established under paragraph (a) hereof, the Clerk shall hold the balance of the judgment in an interest bearing account at First American National Bank in Chattanooga, Tennessee, and on the expiration of fifteen (15) days or the first banking day following the expiration of fifteen (15) days, shall withdraw the proceeds of the account, including all interest earned thereon, and pay the same to the Plaintiff in this case by delivering same to the Strang, Fletcher, Carriger, Walker, firm of Hodge & Smith. ~~trust account for the use and benefit of the~~

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~~plaintiff in this case and distribution of proceeds to plaintiff and his respective counsel for fees and expenses.~~

3. No further interest shall accrue on the Judgment after January 10, 1986, provided Chattem, Inc. tenders the Check to the Clerk of this Court on or before said date. Notwithstanding the foregoing, Plaintiff Wesley T. Bailey may seek to establish entitlement to additional interest on the Judgment arising before January 10, 1986, provided he files a motion for determination of such interest within thirty (30) days from the date hereof. Chattem, Inc. shall have thirty (30) days from the date of the filing of any such motion in which to file a response.

4. The Clerk shall enter a credit on the Judgment in favor of Chattem, Inc. in the amount of $779,541 within fifteen (15) days hereof unless notified by First American National Bank within said time that the Check has been dishonored.

5. The supersedeas bond in the amount of $700,000 heretofore filed by Chattem, Inc. on or about August, 1983 is hereby released and discharged.

6. Plaintiff shall file an itemization of any costs which Plaintiff seeks to tax as soon as practical but not more than twenty (20) days after this Order. Chattem, Inc. shall satisfy such costs or dispute the same within ten (10) days thereafter.

7. The Judgment shall be released of record by the Clerk in the event that the Plaintiff Wesley T. Bailey does not file a motion for determination of additional interest as hereinabove provided within thirty (30) days of the date of this Order.

8. Nothing in this Order shall prejudice Chattem's right to seek restitution of the funds tendered to the Clerk and distributed pursuant to this Order in the event that the Judgment, in whole or in part, should be modified or vacated as a result of any review by the United States Supreme Court of the Judgment of the United States Court of Appeals for the Sixth Circuit which affirmed this Court's Judgment.

SO ORDERED

United States Magistrate

APPROVED FOR ENTRY:

STRANG, FLETCHER, CARRIGER, WALKER, HOGUE & SMITH

By: Carlos C. Smith

Carlos C. Smith
Edward D. Meyer
Attorneys for Plaintiff
Wesley T. Bailey
400 Krystal Building
One Union Square
Chattanooga, Tennessee 37402
(615) 265-2000

HERBERT A. THORNBURY

By: Herbert A. Thornbury

Special Counsel for Plaintiff
Wesley T. Bailey in opposition
to Motion to Intervene
732 Cherry Street
Chattanooga, Tennessee 37402
(615) 756-2221

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CHATTEM, INC.

By: _____
David P. Evans
Attorney for Chattem, Inc.
1715 West 38th Street
Chattanooga, Tennessee 37409
(615) 821-4571

PATRICK, BEARD & SAMPLES, P.C.

By: _____
Attorneys for Poms, Smith, Lande & Rose
Movants for Intervention
Commerce Union Bank Building
633 Chestnut Street
Chattanooga, Tennessee 37450
(615) 756-7117

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REPLY

BRIEF

Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHATTEM, INC., A CORPORATION,

Petitioner,

v.

WESLEY T. BAILEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER CHATTEM, INC.

CHATTEM, INC.
Petitioner

DAVID R. EVANS
Counsel of Record
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402
Telephone: (615) 756-3000

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
1. Petitioner Did Not Tacitly Waive the Requirements of Rule 37, F.R.A.P or Rule 59(e), F.R.C.P	1
2. Respondent Improperly Attempts to Cover Over A Substantial Split Among The Circuits	3
3. Respondent's Contentions Regarding Tennessee Law Are Spurious	5
4. Respondent's Own Authorities Establish That Present Value Calculations Do Not Bear Prejudgment Interest	7
5. Respondent's Claims Concerning the Entry of a Money Judgment Are Without Foundation	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
American Buildings Company v. DBH Attachments, Inc., 676 S.W. 2d 558 (Tenn. App. 1984)	6
Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979)	4
Bailey v. Chattem, Inc., 684 F.2d 386 (6th Cir. 1982)	5
Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948)	3,8
Brown and Williamson Tobacco Corporation v. Walter Jacobson & C.B.S., Inc., 827 F.2d 1119 (7th Cir. 1987).	3,5
Buck v. Burton, 768 F.2d 285 (8th Cir. 1985)	4
G. M. Brod and Co., Inc. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985)	6
Harris v. Chicago Great Western Railway Co., 197 F.2d 829 (7th Cir. 1952)	3
Hysell v. Iowa Public Service Co., 559 U.S. 468 (8th Cir. 1977)	4
Leishman v. Associated Wholesale Electric Company, 318 U.S. 203, (1943)	3
Northern Natural Gas Co. v. Hegler, 818 F. 2d 750, (10th Cir. 1987)	4
Poleto v. Consolidated Rail Corp., 826 F.2d 1270 (3rd Cir. 1987)	6,7
Powers v. New York Central Railroad Co., 251 F.2d 813 (2nd Cir. 1958)	3
Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976)	4
Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987)	4

Table of Authorities Continued

	Page
STATUTES AND RULES:	
28 U.S.C. §1961	*passim*
Rule 37, F.R.A.P.	1
Rule 59, F.R.C.P.	1,2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1702

CHATTEM, INC., A CORPORATION,

Petitioner,

v.

WESLEY T. BAILEY,

Respondent.

REPLY BRIEF OF PETITIONER CHATTEM, INC.

ARGUMENT

This brief is in response to arguments first raised in the Respondent's brief in opposition which was served by mail on May 13, 1988.

1. Petitioner Did Not Tacitly Waive the Requirements of Rule 37, F.R.A.P. or Rule 59(e), F.R.C.P.

At page 12 of its brief in opposition, Respondent cites the Magistrate's order of January 10, 1986 and suggests that the Petitioner "tacitly accepted" a procedural approach which is totally at variance with the procedural requirements of Rule 37, F.R.A.P. and Rule 59(e), F.R.C.P. previously noted by the Petitioner. Nothing could be further from the case.

The January 10, 1986 order, a copy of which is attached as an appendix to the brief in opposition,

followed both the filing of the attorneys' liens by Respondent's attorneys and the Respondent's announced intention to seek additional interest on the basis of an unspecified California case. The preamble of the January 10, 1986 order provided in pertinent part as follows:

> "Now upon the motion to intervene filed in behalf of Messrs. Pom, Smith, Lernde, and Rose [Respondent's attorneys who filed attorneys' liens] and the motion of Chattem, Inc., to satisfy the judgment by the payment of the same into the registry of the Court, and it appearing to the Court that there is a possible dispute as to the amount of interest claimed by the Plaintiff as due on said judgment;"

At the point in time that the order was entered no formal claim had been asserted much less briefed. The time for filing a motion to amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure had long since passed. Respondent's counsel wanted time to make a formal claim and Petitioner wanted the judgment released. The Magistrate could hardly deny a claim as yet unseen, but he could set some reasonable time parameters within which to file such a claim, failing which the judgment would be officially released. Petitioner respectfully submits that it would be totally inappropriate to suggest that paragraph 3 of the January 10, 1986 order establishes anything more than a briefing schedule to resolve the potential claim which had been raised.

Nothing in the order purports to waive any of the procedural barriers facing the Respondent's claims,

procedural bars which have long been held as jurisdictional in nature and incapable of waiver. See *Briggs v. Pennsylvania R.C.*, 334 U.S. 304 (1948) (trial court powerless to award interest not authorized by mandate) and *Leishman v. Associated Wholesale Electric Company*, 318 U.S. 203, 206 (1943) (time for filing motion to an amend a judgment under Rule 59, F.R.C.P. not subject to extension). Respondent's claim regarding the January 10, 1986 order lacks factual support and should not be permitted to cloud the issues presented for review. It was not made before the judge who entered the order and it formed no part of the decision of the Sixth Circuit below.

2. Respondent Improperly Attempts to Cover Over a Substantial Split Among the Circuits.

At pages 7 through 10 of its brief in opposition, Respondent suggests that there is no substantial dispute among the circuits on the issues presented for review. Despite the claim Respondent acknowledges that the Second Circuit persists in following what is chastised as a "formalistic" interpretation of 28 U.S.C. §1961 under which litigants must meet the actual statutory requirements in order to recover the statutory interest provided thereby. *Powers v. New York Central Railroad Co.*, 251 F.2d 813 (2nd Cir. 1958). Respondent makes no mention of similar and equally long standing precedent in the Seventh Circuit. See *Harris v. Chicago Great Western Railway Co.*, 197 F.2d 829 (7th Cir. 1952). For his Seventh Circuit authority the Respondent has instead cited a Seventh Circuit libel case, *Brown and Williamson Tobacco Corporation v. Walter Jacobson & C.B.S., Inc.*, 827 F.2d 1119 (7th Cir. 1987) in which the question of interest does not appear to have been even raised

much less discussed. The position of the Second and Seventh Circuits on the issues presented for review are plainly contrary to those of the Sixth Circuit in the case at bar. Unless the Second and Seventh Circuits are now viewed as trivial or unimportant, Petitioner respectfully suggests that there is indeed a substantial split among the circuits. But it is clear that the split among the circuits is not limited to the long standing views of the Second and Seventh Circuits.

Respondent has also acknowledged that the law on this issue is not yet settled in the Eighth Circuit, pointing only to a trend whereby 28 U.S.C. §1961 has been accorded an "equitable" construction in several recent cases within the circuit which Petitioner previously noted as having failed to address the conflicting holdings of prior precedent within the circuit.[1] Respondent also argues in support of its claim that the Tenth Circuit recently moved away from a "formalistic" approach to 28 U.S.C. §1961 in *Northern Natural Gas Co. v. Hegler*, 818 F. 2d 750, 746-747 (10th Cir. 1987). But if the Tenth Circuit has moved from its earlier position in *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1987), and it appears to have done so, Petitioner respectfully suggests that the decision further underscores the need for review and guidance by this Court. A fair reading of the Tenth Circuit's decision in *Northern Natural Gas* suggests that the "ascertainment" anal-

[1] Compare *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977) and *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053 (8th Cir. 1976) with *Buck v. Burton*, 768 F.2d 285 (8th Cir. 1985) and *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987).

ysis used by the court is anything but clear or readily susceptible to evenhanded application.

3. Respondent's Contentions Regarding Tennessee Law Are Spurious.

At page 11 of its brief in opposition, Respondent suggests that the failure to address the issue of interest under Rule 37, F.R.A.P. was understandable in light of Tennessee law. Petitioner respectfully submits that the Respondent's suggestion is totally spurious and again should not be permitted to obscure the issues presented for review.

Respondent sued the Petitioner in federal court, not state court. Despite the extended *Erie* analysis by the Sixth Circuit in the case at bar, an analysis which ultimately concluded that federal law did in fact apply, the Petitioner and Respondent have always been in agreement that the Respondent's claim for prejudgment interest (interest before the date of the judgment on which interest was being calculated) could only be awarded, if at all, under the provisions of 28 U.S.C. § 1961. Petitioner also respectfully notes that it would be difficult for the Respondent to claim surprise because *Briggs* has been outstanding for more than thirty years and had long been codified as part of the Federal Rules of Appellate Procedure. Finally, Petitioner also wishes to note that Tennessee law did not even apply to the Respondent's claim. Indeed, if Tennessee law had applied, Respondent's claim would have been barred as a matter of law. *Bailey v. Chattem, Inc.*, 684 F.2d 386, 392-393 (6th Cir. 1982).

Respondent's brief in opposition also attempts to buttress its claims by erroneously contending that in a diversity action, such as this, the award of post-

judgment interest prior to the 1982 amendment of 28 U.S.C. § 1961 was determined by state law, citing *G. M. Brod and Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526 (11th Cir. 1985). However, Respondent's reliance on *Brod* is misplaced. Prior to the 1982 amendments, state law governed only the rate of interest under 28 U.S.C. §1961 as *Brod* and the 1982 amendments to the statute clearly indicate.

Respondent also has cited *American Buildings Company v. DBH Attachments, Inc.*, 676 S.W. 2d 558 (Tenn. App. 1984), arguing that if Tennessee law had applied to the award of interest in this case such an award would automatically be due without express mention in the appellate court remand. There is no indication of such a broad principle in the *American Buildings* holding and perhaps the best view of that case is that in awarding interest from the date of the judgment establishing liability the case is correct on its facts. None of the damages awarded in *American Buildings* represented future damages yet to be incurred. But Petitioner respectfully wishes to note that neither Tennessee nor any other state to its knowledge adds interest to a future stream of damages not yet accrued. See, for example, *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1278 n.14 (3rd Cir. 1987), cited by the Respondent in his brief in opposition, which specifically states that future economic harms must be excluded from an award of prejudgment interest because it would be antithetical to adjusting a future stream of income to its present value.

4. Respondent's Own Authorities Establish That Present Value Calculations Do Not Bear Prejudgment Interest.

At page 6 of the brief in opposition, the Respondent charges that it would be "inequitable in the extreme" to deny the prejudgment interest which he has sought, arguing that such interest merely provides him with full compensation and places him on an equal footing with the Petitioner. Respondent's claims conveniently omit any reference as to how his damages were calculated and fail to cite a single state or federal authority suggesting that prejudgment interest should be added to a present value calculation.

As the authority which the Respondent has cited in his own brief indicates, however, the award of prejudgment interest on future damage is antithetical to the adjustment of a future stream of income to its present value. *Poleto v. Consolidated Rail Corp.*, supra. Petitioner has paid all of the interest accruing on that present value award from and after the August 5, 1983 judgment. To the extent that the ruling of the Sixth Circuit purports to make a prejudgment interest award on such damages it only creates a windfall. Efforts to avoid the problem of justifying an award of prejudgment interest on a present value calculation by characterizing it as post-judgment interest are simply disingenuous. The interest sought is for a period preceding the actual judgment on which interest is being calculated and cannot be justified under any rational theory.

5. Respondent's Claims Concerning the Entry of a Money Judgment Are Without Foundation.

At page 6 of its brief in opposition, Respondent suggests that there was a money judgment entered

in this case and that the only question determined by the court of appeals was the day from which interest on that judgment would run. Respondent further suggests that the conflict between the Sixth Circuit's decision in the case at bar and the requirements of 28 U.S.C. §1961 are unclear. But the Respondent never indicates where the money judgment could be found prior to the entry of the judgment on August 5, 1983, or how the October 27, 1980 award vacated by the Sixth Circuit could constitute a money judgment recovered in a district court. Not surprisingly, the Respondent has also failed to indicate why the judgment date would be August 5, 1983 for purposes of fixing the applicable rate of interest as Respondent has claimed while the second statutory reference to that same antecedent money judgment would mean October 27, 1980 for purposes for determining when interest is to begin accruing.

To the extent that the Sixth Circuit has recalled its 1982 mandate to allow for an award of interest from the date of the judgment establishing liability, it has clearly abused its authority to recall its mandate under *Briggs* in order to protect the integrity of its own processes. If the mandate had been recalled before the retrial on damages, Petitioner could have objected to a present value calculation based on the August, 1983 trial date instead of the October 27, 1980 judgment establishing liability. But the Sixth Circuit's decision is clearly improper on a retrospective basis and should not be permitted to stand.

CONCLUSION

Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

DAVID R. EVANS, ESQ.
Counsel of Record
CHAMBLISS, BAHNER, CRUTCHFIELD,
GASTON & IRVINE
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402
615-756-3000

Dated: May 24, 1988

OPINION

SUPREME COURT OF THE UNITED STATES

CHATTEM, INC., PETITIONER *v.* WESLEY T. BAILEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-1702. Decided June 13, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The question here is—when an initial money judgment for a plaintiff is vacated, but later reinstated—what date should be used when calculating an award of post-judgment interest: the date of the first judgment for the plaintiff or the date of the later award?

In this diversity action, respondent sued petitioner claiming fraud and breach of contract. The jury reached a verdict for respondent, and awarded damages. However, on appeal, the Court of Appeals vacated the judgment, finding that the instructions given to the jury had been inadequate. *Bailey* v. *Chattem, Inc.*, 684 F. 2d 386, 396–397 (CA6 1982). A second trial ensued, where the jury again ruled for respondent; the jury's verdict was even greater this time than was the initial award. This second judgment was affirmed on appeal.

Respondent then asked the District Court to amend its judgment order, so that the post-judgment interest the District Court had awarded respondent would run from the date of the original judgment in the case, and not the date of the judgment following re-trial. Petitioner opposed this request, noting that the statute which provides for post-judgment interest in civil cases, 28 U. S. C. § 1961, stipulates that interest "shall be calculated from the date of entry of the judgment." Since the initial judgment had been invalidated on appeal, only the date of entry of the second judgment could be the basis for calculating post-judgment interest under § 1961, petitioner argued. The District Court ruled

for petitioner on this issue, but the Court of Appeals reversed and held that post-judgment interest would be calculated from the date of the initial judgment. 838 F. 2d 149, 153 (CA6 1988).

In so doing, the Sixth Circuit noted that petitioner's position had been accepted by the Second, Eighth, and Tenth Circuits. *Ibid.* See, *e. g.*, *Ashland Oil, Inc.* v. *Phillips Petroleum Co.*, 607 F. 2d 335, 366 (CA10 1979); *Hysell* v. *Iowa Public Serv. Co.*, 559 F. 2d 468, 476–477 (CA8 1977); *Powers* v. *New York Central Railroad Co.*, 251 F. 2d 813, 818 (CA2 1958). The Seventh Circuit likewise has adopted a similar reading of § 1961. See *Harris* v. *Chicago Great Western Railway Co.*, 197 F. 2d 829, 836 (CA7 1952). These courts all conclude that the phrase "date of entry of the judgment" in § 1961 must be read narrowly, and cannot refer to a judgment later vacated on appeal.

By contrast, the Sixth Circuit in this case—and the First, Third, Fifth, and Ninth Circuits in other cases—have adopted a broader reading of § 1961. See, *e. g.*, 838 F. 2d, at 153–155; *Poleto* v. *Consolidated Rail Corp.*, 826 F. 2d 1270, 1280–1281 (CA3 1987); *Affiliated Capital Corp.* v. *City of Houston*, 793 F. 2d 706, 710 (CA5 1986); *Turner* v. *Japan Lines, Ltd.*, 702 F. 2d 752, 755 (CA9 1983); *United States* v. *Michael Schiavone & Sons, Inc.*, 450 F. 2d 875, 876–877 (CA1 1971). These courts all have concluded that the purposes of § 1961 are best effectuated by giving a prevailing plaintiff post-judgment interest from the date of the original judgment in his favor.

Because this case presents a conflict among the Circuits over the proper application of an oft-used federal statute (28 U. S. C. § 1961), I would grant the petition for certiorari.